Telkom Kenya Limited v Naomo (Civil Appeal E320 of 2023)
[2024] KEHC 9712 (KLR) (22 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9712 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E320 OF 2023

BM MUSYOKI, J

JULY 22, 2024

BETWEEN

TELKOM KENYA LIMITED ..... APPELLANT

AND

SARA NAOMO ..... RESPONDENT

(An appeal from ruling and orders in the Chief Magistrates Court at Kiambu (Hon. M.A Opondo PM) dated 3-08-2023 in her civil case number 108 of 2010)

JUDGMENT

1. The Kiambu Chief Magistrate's court civil case number 108 of 2010 which is the subject of this appeal was consolidated with civil cases numbers 106, 110 and 111 all of 2010 for purposes of hearing. On 3-6-2013, case number 111 was by consent of the parties then represented selected as the test suit on liability as they all arose from the same accident. All the other suits including the one which is subject of this appeal were stayed pending determination of liability in case number 111 of 2010. The said test suit took off on 11-03-2011. The 1st defendant testified on 23-01-2014 and his advocate sought for adjournment to enable him call the medical superintended of Kiambu District Hospital.

2. The last time the proceedings were taken in Cmcc number 111 of 2010 was on 29-09-2016 when the court made an order for typed proceedings to be supplied to the parties. After that, it seems that there arose a confusion which no one detected. The court started taking proceedings in Cmcc number 108 of 2010 with no reference to the stage the test suit had reached. On 6-03-2023, Mr. Njau for the plaintiff stated in court thus 'we pray for a further hearing date. The other three files were consolidated. This 108 is the lead file'.

3. These matters have been in court for the last fourteen years under circumstances which are unfortunate. The issues in the suits are not complex and it is incomprehensible why such matters should clog the court system for over a decade. This appeal seeks to extend the life of these matters

for another indefinite period. The matters had been fixed for defence hearing on 19-04-2023 but on the said date, the appellant came with an application dated 17-04-2023 which was seeking to have the proceedings and interlocutory judgements set aside and have the matters heard afresh. Since then, which is more than a year down the line, the parties are still in the same spot where the appellant halted the proceedings.

4. Upon filing of the suit, summons to enter appearance were processed and served upon the defendants. The 1st and 2nd defendants entered appearance and filed their defence. The 3rd defendant did not enter appearance and judgement against them was entered on 18-03-2011. After several false starts as indicated above, the matter proceeded with a few confusions until the 3rd defendant showed up and made application seeking that the default judgments be set aside and matters heard afresh with leave to it to defence. By ruling dated 3-08-2023 the Honourable trial magistrate dismissed the appellant's application dated 17th April 2023 which ignited this appeal.

5. There are three instances where the court would put into consideration in deciding on an application to set aside interlocutory judgement. A court should set aside judgment as a matter of right even *suo moto* where the same was entered irregularly. An interlocutory judgment can be irregular for many reasons. An irregular judgement is one which should not have been entered in the first place. For instance, where judgment was entered when the time allowed in law for one to enter appearance had not lapsed or where there was defence but for some omission or mistaken believe the court entered judgement, the same would eb an irregular judgment. A court would also set aside judgement where it is proved on a balance of probabilities that the defendants were not served or properly served with summons to enter appearance. If the defendant proves that they have a good defence, the court would also set aside judgment despite there having been proper service for interest of justice on such terms as the court would deem fit.

6. The appellant had two grounds for its application. The first one was that it was not made aware of the proceedings by its insurance brokers while the 2nd ground was that it had a good defence to the claim. The appellant admitted that it was served with summons to enter appearance on 2-06-2010. It averred through its legal officer one Faith Namai that upon receiving the summons, it forwarded the same to its insurance brokers for action and they had since then been waiting for updates from their insurance brokers until they were served with a hearing notice dated 17th March 2023.

7. The appellant exhibited letters and other communications to the AON Minet Insurance brokers in which they were allegedly following up the status of the matters. The communications indicate that the follow ups were in respect to civil suits numbers 106, 108, 110 and 111 of 2010. For clarity purpose, the communications were as follows;

8.

   a. Letter dated 2-06-2010 which was forwarding the summons to enter appearance and plaints to the insurance brokers.

   b. Communication dated 25-02-2013 which appears to be an email was asking for an update on the matters. It is important to note that this was almost three years after the first letter.

   c. Another communication dated 22-05-2013 which also appears to be an email was asking for an update on the matters.

   d. There is another email dated 25-06-2023 which called for update of the matters.

   e. There is another email dated 12-10-2013 which was enquiring whether the matters had been settled to enable them close their file.

f. The final communication is dated 30-08-2017 which was asking for update on the matters.

9. The appellant has not told the court whether the above communications were replied. I refuse to believe that a corporate body like the appellant could just sit back comfortably as its letters were not being responded to. If it did so, then that was negligence or reckless conduct of the highest order. These communications were done by a senior employee of the appellant working in a legal department who must have known the consequences of going silent on matters pending before the court. It was not enough for a legal officer or advisor as it is indicated to draw letters in respect of matters pending before the court and sit pretty for thirteen years. The fact that they were writing letters to the insurance brokers is an indication that they were aware that the matters were still pending before the court. It is the duty of a client to follow up and update themselves on the status of matters before court.

10. The appellant did not even think it fit to appoint an advocate to act for it in the matter. I note that the letters dated 25-02-2023 and 30-08-2017 bear the same reference number which means that the appellant kept a file for the matters and the allegations that they did investigations after they received a hearing notice dated 17th March 2023 does not hold water. In the premises, I find and hold that the appellant was aware of existence of the matters and chose not to involve themselves in them or participate in the proceedings. The averments that they were not aware of the matter are an afterthought.

11. The appellant claims that it has a good defence to the claim. It has attached a draft defence to the supporting affidavit as annexure 'TKL4'. The defence the appellant intended to mount was that it had no proprietary interest in or control over motor vehicle registration number KAE 182R which caused the accident cause of action. The appellant argued that its name appeared in the records of the vehicle as a co-owner with the 2nd defendant in order to protect its interest as a financier. It claimed that it had granted a loan to the 2nd defendant who was its employee until 1-02-2007 when she was released and paid off. I have gone through the documents the appellant claims to be its evidence for this line of defence. There is letter of offer dated 17th 2003 and the loan agreement. The same does not speak of motor vehicle registration number KAE 182R. The only document which has the registration number of the said vehicle is a letter dated 17-11-2003 advising one Francis G. Muiruri that the appellant was granting loan for the purchase of the said vehicle to one Alice W Wairegi. It is not clear to me whether the person named therein is the same as the 2nd defendant in the lower court file who is described as Alice Hinga.

12. The appellant claims to have released the 2nd defendant on 1-02-2007. The accident herein occurred in 11-06-2009, two years later. I take judicial notice that insurance covers in the country are normally for one year. In that case what business did the appellant have in accepting summons in 2010 and forwarding the same to the insurers? That action meant that it had insurable interest in the vehicle as at 11-06-2009 when the accident occurred. This is buttressed more by the communications the appellant continued to send to the insurers as late as 30-08-2017, ten years after it allegedly released the 2nd defendant.

13. If infeed the appellant had no interest in the motor vehicle as alleged, it would have filed an application to strike out its name from the proceedings or take steps in defending the suit. Sending the summons to the insurers was a clear indication that it still had interest in the vehicle as at the time of the accident. The draft defence does not plead or make any claim for indemnity against the 2nd defendant. The appellant has not exhibited the transfer or discharge of the motor vehicle after it allegedly released the 2nd defendant after payment of the loan. It has not shown that it wrote or issued a notice to the registrar of motor vehicles informing him of the change of ownerships as required by Section 9(2) of the *Traffic Act* Chapter 403 of the Laws of Kenya.

14. In view of the above, the appellant appears to me as a dishonest litigant. He has come to court seeking discretionary orders which are in nature of equitable reliefs. It is not sincere in its pleadings and averments. The courts should detest litigants who deliberately stay away from proceedings and peep through the window monitoring the progress of the same with the hope that nothing against them will succeed then come out to reverse or halt the wheels of justice towards the tail end of the proceedings especially in old matters like the ones before the lower court. This should be discouraged by all means however strong a party feels its defence is.

15. As it has been held in many cases one of them being *Shah v Mbogo*[1967] EA 116, the purpose of setting aside judgment is intended to avoid an injustice or hardships resulting from an accident, inadvertence or excusable mistake or error but not to assist someone who has deliberately sought to obstruct or delay the course of justice. In my opinion, the appellant fits in the last part of that sentence. It deliberately stayed away from the proceedings for thirteen years. Its attempt to set aside the judgements was in my opinion, a deliberate action meant to obstruct the course of justice.

16. In final analysis I find no merits in this appeal and I hereby dismiss it with costs to the respondent. The matters in the lower court should be expedited and completed as a matter of priority. In order to avoid further confusion, the lower court shall adhere to consent recorded by the parties on 3-06-2013 and have Cmcc number 111 of 2010 concluded as a test suit on liability with proceedings been taken in that particular file. I so order.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.