Kibule v Nawal Forex Bureau Limited (Civil Appeal E214 of 2019)
[2024] KEHC 16766 (KLR) (Civ) (19 September 2024) (Judgment)

Neutral citation: [2024] KEHC 16766 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E214 OF 2019

NIO ADAGI, J

SEPTEMBER 19, 2024

BETWEEN

EUNICE ACHERUGUT SUDI KIBULE ..... APPELLANT

AND

NAWAL FOREX BUREAU LIMITED ..... RESPONDENT

(Being an Appeal from the Ruling of Hon. D. O. Mbeja (SRM) in Milimani CMCC No. 6132 of 2025 delivered on 22/03/2019)

JUDGMENT

Background:

1. The Respondent instituted suit by a Plaint dated 6/10/2015 seeking orders inter alia that a judgement be entered against the Appellant for a liquidated amount of Kshs.2,917,000/- plus interest and costs.

2. The Appellant filed her statement of defence dated 28/9/2016 in opposition to the Respondent's claim.

3. The Respondent herein then filed an application dated 21/10/ 2016 seeking that the Appellant's defence to be struck out and judgment be entered for the Respondent for the amount of Kshs. 2,917,000/-. The application was based on the grounds that the defence was a sham and amounted to a mere denial; it did not raise any triable issues; the same was scandalous, frivolous and vexatious; the same was meant to delay the quick and fair trial of the suit and it was an outright abuse of the Court process.

4. The Appellant filed Grounds of Opposition to the application dated 21/10/2016. Parties were directed to file submissions and after compliance a ruling was delivered on 18/4/ 2017 striking out the Defence

for being a sham and deficient of any triable issue; on the strength of the cheques issued that were never cashed as the Appellant never gave any instructions as promised.

5. The Appellant then filed a Notice of Motion application dated 13/7/2018 and sought the following orders:

   a) That the application be certified urgent and heard ex parte in the first instance.

   b) That the interlocutory judgment issued by the Honourable Court together with all subsequent orders be set aside and the Defendant be granted leave to Defend the matter.

   c) The decree and warrants of attachment issued to M/S Sterling Auctioneers be stayed pending the hearing and determination of this application inter-partes.

   d) That the costs of this application be in the cause.

6. Upon considering the Application through its Ruling dated 22/3/2019 the trial court dismissed the application and found that the court was satisfied that the Defence filed in court did not raise any triable issues.

7. Aggrieved by the said ruling of the trial court, the Appellant preferred the Appeal herein.

8. The Appellant lodged the appeal herein through a Memorandum of appeal dated 12/4/ 2019 which raises the following 3 grounds;

   i. That the learned magistrate erred in fact and in law by failing to exercise his unfettered jurisdiction judicially and set aside the default judgement as the defence raised triable issues that would be tested at the trial of the case.

   ii. That the learned magistrate erred in law and in fact by failing to judicially evaluate the unique facts and circumstances of the case before him so as to consider whether or not the appellant herein would suffer any prejudice if denied an opportunity to be heard on merit.

   iii. . The learned magistrate failed to consider the nature of action brought against the defendant and the defence to it thereby denying the defendant a hearing on merit contrary to the provisions of *the Constitution* of Kenya 2010 and Fair Administrative Actions Act.

Issues for determination:

9. Having considered the trial court record, the grounds of appeal and submissions for and against this appeal and the cited cases, this court is of the view that the only issue for determination is whether the learned trial Magistrate erred in disallowing the Appellant's application dated 13/07/2018 and that this appeal should be allowed.

Analysis and Determination

10. What is clear from the appeal herein, is that, it is in regard to invoking the trial court's exercise of its discretionary powers.

11. This being a first appeal, this court reminds itself of its primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the evidence and then determine whether the conclusions reached by the learned magistrate are to stand and give reasons either way. That was the pronouncement of the court in the case of Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR. The court held that a first appellate court has a duty to re-evaluate, re-assess and re-analyze the record and make its own conclusions.

12. The circumstances in which an appellate court can upset the exercise of discretion of a trial court were laid down by the Court of Appeal in Mbogo and Another v Shah [1968] EA and further in the case of Wachira Karani v Bildad Wachira (2016) eKLR, wherein the court had the following to say:

> " Mulla, the Code of Civil Procedure (2) has illuminated the grounds for setting aside an ex parte decree and what constitutes sufficient cause for setting aside an ex parte judgment/ decree. Essentially, setting aside an ex parte judgment is a matter of the discretion of the court. In the case of Esther Wamaitha Njihia & two others v Safaricom Ltd (3) the court citing relevant cases on the issue held inter alia: -
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> > "the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel v E.A. Cargo Handling Service Ltd (4) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah v Mbogo.] The nature of the action should be considered, the defence if any should also be considered; It also goes without saying that the reason for failure to attend should be considered."

13. In Francis Wambugu v Babu Owino & Others, SC Petition No. 15 of 2018, on the issue of an appellate court entertaining an appeal founded on exercise of discretion of the trial court, it was stated:

> " (76) In determining therefore an issue based on the exercise of a discretion, as has been observed, a Court can only be faulted if the use of the discretionary power was based on a whim, and that it can be established that the Court did not consider the prevailing circumstances and take into account what needed to be considered, or considered what ought not to have been considered. To infringe upon this discretionary power, would be tantamount to a judicial review of the decision of another Court's decision. This is an exercise which this Court, and indeed every other Court, should refrain from engaging in as it would be considered, or indeed viewed as, an interference in another Court's judicial independence and exercise of discretion."

14. The Appellant submits that the learned trial magistrate erred in fact and in law by failing to exercise his unfettered jurisdiction judicially by setting aside the default judgement as the defence raised triable issues that would be tested at the trial of the case. The Appellant further contested the mode of service in the suit matter whether by herself, or adult members of her family and or agents. She maintains that she was never served with the notice of entry of judgement or with the judgement notice in the suit matter.

15. The Appellant also faults the trial court's ruling for finding that indeed the Appellant had instructed advocates (The firm of Ochoki & Ochoki Associates Advocates) as proof that the Appellant was aware of the case. That the learned magistrate went ahead and made an adverse ruling against the Appellant who had put forward that the firm of Ochoki & Ochoki Associates Advocates did not exercise due diligence to prosecute the Appellant's case.

16. The Appellant has faulted her previous advocates on record for the failure and the delay in prosecuting the Appellant's case. The Appellant has cited the case of in Lucy Bosire v Kehancha Division Land Dispute Tribunal & 2 others [2013] eKLR wherein it was held:

> " It is true that where the justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined in its merits.

17. The Appellant submits that she was denied a fair hearing by the trial court by failing to allow her an opportunity to defend herself and she relies on Article 50 of *the Constitution* of Kenya.

18. That the trial Court erred in law and in fact by refusing to hear her on merit and striking out her statement of defence, by so doing the trial court failed to analyse her evidence leading to an unfair judgement.

19. The Appellant submits that the trial court further failed to set aside the summary Judgement that had already been entered despite the Appellant raising several triable issues that ought to have been considered and relevant to the Court in making its decision. The Appellant cited Article 47 of *the constitution* fair administrative action and relied on the case of Smith v. Jones, [1999] 1 S.C.R. 455, the Supreme Court in Canada held thus;

> " that striking out a defendant's statement of defence should be a measure of last resort and should only be done in cases where the defendant's conduct is egregious or prejudicial to the administration of justice."

20. She concluded, that the decision of the trial court not to hear the Appellant on merit amounted to an unfair administrative action that would only be solved by the decision of this court.

21. On the other hand, the Respondent submits that the Appellant's appeal is not meritorious and should be dismissed with costs on account that through the ruling of 22/3/2019, the trial magistrate did not misdirect himself on the law, nor did he misapprehend the facts. Neither has the Appellant demonstrated that the trial magistrate took into considerations factors he ought not to have considered nor did he fail to take into account factors he ought to have taken into account, nor is the trial court's decision wrong.

22. The trial court was right in finding that the defence raised no triable issue and was a prime candidate for striking out. The Respondent submitted so on account of the admission of the Appellant that she was loaned an amount of Kshs.262,000 through her witness statement dated 18/9/2016. The Appellant goes ahead to indicate that she cleared the amount through payment to the Respondent some Kshs.350,000/-. The trial court found that this repayment was not supported with anything, no date was given when it was made and in which mode it was made. The trial court found that the amounts were due and owing to the fact that the Appellant issued 3 cheques which were never cashed and no explanation was offered by the Appellant why the cheques were drawn.

23. The Respondent has invited this court to look at the letter from the Appellant dated 12.04.2019. In that letter there is an admission by the Appellant that she owes the Respondent and she confirms that she was willing to pay and settle the amount. The second document is the Supporting Affidavit of the Appellant found at page 32-33 of the Record of appeal. In that supporting affidavit particularly paragraphs *3* the Appellant admits authoring the letter referred to at page 32 of the Record of Appeal.

24. The Respondent submits that the witness statement of the Appellant, the stale cheques issued by the Appellant drawn to the Respondent and the letter authored by the Appellant all constitute admissions of being loaned some amount and the same was due and owing. In view of the fact that the Respondent's claim was for the amount loaned which was admitted and the general averments in the Statement of Defence, the Defence could not raise any triable issues.

25. The Appellant never explained what became of the stale cheques she issued twice and what their purpose was. Further, the Appellant has not demonstrated how the amounts in those cheques were settled in view of the fact that the cheques were not cashed.

26. The Respondent cited various decisions including the case of National Bank of Kenya Vs Daniel Opande Asnani [2002]eKLR which was quoted with approval in the case of Ecobank Kenya Limited Vs Bobbin Limited & 2 Others [2014]eKLR where it was held:

> " The law is now settled and that the admission upon which a court of law will act to strike out a defence and enter judgment must be clear and unambigous. The same admission need not be in the pleadings only. It can be discerned in any other way...I am satisfied that the debt herein had been admitted...l do allow the application."

27. The position was also held in the case of Njoka Tanners Ltd & Anor Vs Paul Kigia [2011] eKLR where Kasango J opined as follows:

> " it therefore follows that the 2nd Appellant can raise no defence as she seeks to do to the Respondents claim for value of the cheques she issued. The only defence she can raise is one of duress, fraud or illegality."

28. Equally in Bank of Baroda (K) LTD Vs Altec Systems LTD [2013] eKLR it was held:

> " ...I have heard a very loud silence from the Defendant on repayment. Accordingly, to investigate the element of the Defence relating to the sum of Kshs.3,854,217.50 would be a fait accompli. It would be futile and bogus...there is no special traverse by the Defendant".

29. That in Bakek Millers Ltd Vs Esgee Industries Limited [2014] eKLR it was held:

> " It cannot be gainsaid that the striking out of a pleading should be done sparingly. It is a procedure which is entitled to have his defence proceed to

30. The Respondent urges this court to be guided by the holding in Itute Ingu & another v Isumael Mwakavi Mwendwa [1994] eKLR in rejecting the Appellant's attempt to deceive the court by placing imaginary mistakes on the door of the former advocates, when those fanciful mistakes did not have a bearing on the finding of the trial Court, thus :

> " I would myself reject that kind of contention and hold that while a mistake by counsel is not necessarily a legal bar to the Court exercising its discretion in favour of the victim of the mistake, the Court is nevertheless entitled to examine the nature and quality of the mistake before deciding in which direction the discretion should go"

31. The Respondent is of the view that the Appeal by the Appellant is devoid of merit should be dismissed with costs to the Respondent.

32. In the premises, and having taken into consideration the circumstances of this case, first I will determine whether the Appellant's previous advocates can be faulted for the failure and the delay in prosecuting the Appellant's case. It is my finding that the Appellant has not pointed out any specific mistake in as far as the ruling under appeal is concerned that can be ascribed to previous Counsel by the Appellant. The Appellant alleges delay by the advocate in prosecuting the Appellant's case whereas her case was defended by filing of the defence and the participation in the application for summary judgment. This line of argument by the Appellant is therefore misplaced in the circumstances of this matter and the same is overruled.

33. Second, I am to determine whether the Statement of Defence raises triable issues that ought to be considered in a full trial. I have read through the said Statement of Defence and also looked at the letter from the Appellant dated 12.04.2019. In that letter there is an admission by the Appellant that she owes the Respondent and she confirms that she was willing to pay and settle the amount. The second document is the Supporting Affidavit of the Appellant found at page 32-33 of the Record of appeal. In that supporting affidavit particularly paragraphs *3* the Appellant admits authoring the letter referred to herein above.

34. The witness statement of the Appellant, the stale cheques issued by the Appellant drawn to the Respondent and the letter authored by the Appellant all constitute admissions of being loaned some amount and the same was due and owing. In view of the fact that the Respondent's claim was for the amount loaned which was admitted and the general averments in the Statement of Defence, the Defence could not raise any triable issues.

35. In addition, the Appellant never explained what became of the stale cheques she issued twice and what their purpose was. The Appellant has not demonstrated what happened to the amounts in those cheques and whether they were settled or not.

36. I am persuaded that the learned trial magistrate rightly found that Statement of Defence did not raise triable issues that ought to be considered in a full trial.

37. In the premises aforesaid, it is my considered view that the appeal herein has no merits and the same is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF SEPTEMBER 2024.

NOEL I. ADAGI

JUDGE