St Mary's Tachasis Secondary School v Leev Contractors (Civil Appeal E141 of 2023) [2024] KEHC 11021 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11021 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E141 OF 2023

RN NYAKUNDI, J

SEPTEMBER 20, 2024

BETWEEN

ST MARY'S TACHASIS SECONDARY SCHOOL ..... APPELLANT

AND

LEEV CONTRACTORS ..... RESPONDENT

JUDGMENT

1. The appeal arose from the Small Claims Court Ruling dated 28th July, 2023 dismissing the Appellant's application seeking leave to file a response out of time. In the Memorandum of Appeal dated 31st July, 2023 the appellant relies on grounds as follows:

    a. The learned adjudicator erred in law by deliberately failing to consider the salient issues raised by the Appellant in regard to irregularity of the judgment in default of appearance entered against the Appellant.

    b. The learned adjudicator erred in law in solely relying on the respondent's evidence and submissions' and failing to consider the appellant's submissions in arriving at her findings against the appellant.

    c. The learned adjudicator erred in law and fact by failing to fairly and objectively consider the Appellant's application and the reasons for seeking to set aside the judgment in default of appearance.

    d. The learned adjudicator erred in law and fact by relying on the wrong principles in arriving at the decision to disallow the appellant's application to set aside the judgment in default.

    e. The learned adjudicator erred in fact and law by failing to give a well-reasoned ruling and condemning the appellant unheard.

f. The learned adjudicator erred in fact and law by dismissing the appellant's application against the Respondent with costs.

g. The learned adjudicator averred in fact and law by selectively applying and/or ignoring settled principles of law hence making a finding that is clearly outside the law and her decision is without substance, full of inconsistencies and was arrived at in a cursory, speculative and perfunctory manner.

2. The Appellant prayed for orders as follows:

a. That this appeal be allowed with costs.

b. That the adjudicator's ruling against the appellant be set aside and

c. This Honourable court makes such and further orders as it deems fit and just to meet the ends of justice.

3. The facts leading to the claim at the Small Claims court are that the Respondent entered into an agreement with the appellant for installation and supply of electrical CCTV materials. Pursuant to the said agreement, on diverse dates in the year 2017 to 2019, the Respondent delivered and installed the materials that were ordered and upon delivery and installation they issued invoices to the appellant for them to effect payment. The Respondent averred that they delivered goods worth Kenya Shillings Two Million Two Hundred and Sixteen Thousand, Four Hundred and Four (Kshs. 2,216,404/=). That upon receiving the invoices the respondent paid a total of Kshs. 1,083,000/= through cheques deposited in the Claimant's Diamond Trust Bank Account receipt of which was acknowledged.

4. From the record, on 15th February, 2023 Learned Counsel Mr. Oyaro confirmed service upon the Appellant and prayed that judgment be entered. The court subsequently proceeded to enter judgment in the sum of Kshs. 1,000,000/= plus costs and interests from the date of filing until payment in full.

5. The appellant thereafter filed an application dated 17th March, 2023 seeking to be granted leave to file a response and seeking to set aside the default judgment. The application was based on grounds that the appellant was served with the pleadings on 13th February, 2023 and by the time it had the same transmitted to the office of the Attorney General, judgment had already been entered.

6. The learned magistrate considered the application and made a dismissed the application for reasons that there was no excusable mistake and/or compelling reason that had been presented before the trial court to warrant the orders prayed for in the application.

7. At the time of drafting this judgment, the parties had not filed their written submissions as ordered by this court. However, that does not render this court incapable of making a determination placing reliance on the record of the trial court and the grievances raised by the appellant.

Determination.

8. The substratum of this appeal is on a judgment regularly obtained which the Appellant applied to set aside for reasons that there was an omission to file a response against the Respondent's claim within the stipulated timelines. I have had occasion to peruse through the record carefully. I have equally read through the pleadings and considered the grounds raised in the memorandum of appeal.

9. This being the first Appellate Court in this case, the duty of the Court is to re-evaluate, re-assess and re-analyse the available evidence and then come up with its own conclusion, while bearing in mind that the Court never saw or heard the witness. See Selle vs Associated Motor Boat Co. Ltd (1968) EA 123, 126.

10. For starters, I am conscious of the fact that this court can only interfere with the findings of the trial court if at all they were arrived at without considering relevant circumstances or relevant facts. In the Supreme Court in the case of Sonko v County Assembly of Nairobi City & 11 others (Petition 11 (E008) of 2022), had this to say:

> " A first appellate court should accord deference to the trial court's conclusions of fact and only interfere with those conclusions if it appeared to it, either that the trial court had failed to take into account any relevant facts or circumstances or based the conclusions on no evidence at all, or misapprehended the evidence, or acted on wrong principles in reaching the conclusions."

11. This Court cannot simply interfere with the discretionary powers of the trial court just because this is an Appeal. See the case of Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others [2019] eKLR, where the Supreme Court had this to say about interfering with the appellate powers;

> " In reiterating the above position, we affirm that we would only interfere with the Appellate Court's exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court's exercise of discretion."

12. What features more prominently, from both the record and the judgment of the trial court is the issue of delay which is an important consideration in the determination of this appeal. Whether this court has sufficient grounds to set aside the default judgment regularly obtained by the Respondent. It is trite law under the tenets of procedural law that a defendant once served with the suit papers or the statement of claim, is expected to act promptly and expeditiously in filing his defence or answer to the claim. In the event he fails to meet the set timelines in the Civil Procedure Rules and a default judgment is entered, he is under a legal duty to provide affidavits on the merits explaining precisely on the grounds or reasons which constituted a bar from filing a statement of defence in answer to the claim. Therefore, the trial court as a matter of course expected to take into account any explanation or evidence in the affidavit demonstrating how the defendant in this case the Appellant found itself bound by a judgment regularly obtained to which it could have set up some serious defence in proper time.

13. The Court of Appeal in addressing the circumstances under which an ex-parte Judgment could be set aside stated in the case of Gicharu Kimani & Associates Advocates –vs- Samwel Kazungu Kambi [2020] eKLR as follows: -

> " Considering the circumstances of this motion, the facts regarding the merits or demerits of it one must take into account in exercise of discretion that it's within the ambit of the guiding principles laid down in the case of *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another Civil Appeal No 6 of 2015* eKLR (Msa), the Court of Appeal stated as follows:
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> "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 to set aside the default Judgment, among other. (See Mbogo & Another v Shah (supra), Patel v EA Cargo Handling Services Ltd {1975} EA 75, Chemwolo & Another v Kubende {1986/KLR 492 and CMC Holdings v Nzioki {2004/1 KLR 173})'.

14. The argument that has been advanced in the present case is that it took time for the suit papers to be transmitted to the Office of the Attorney General. Therefore, the Appellant is not alleging that the exparte Judgment is irregular, but although the same was regularly entered there were delays experienced for counsel to enter appearance.

15. What the Appellant forgets is that the *Small Claims Court Act* as enacted by parliament was intended to introduce a new era in Civil Litigation in which both the parties and the courts were expected to pay more attention to promoting efficiency and avoiding delay. The overriding objectives expressly recognizes for the first time the importance of ensuring that claims filed in that forum are dealt with expeditiously and fairly and in that context, from initiation of the claim to judgment, the timeline is capped at 60 days. The provision of sixty days suggests that promptness now carries much greater weight in Small Claims Court in comparison with the traditional civil courts. It is a condition precedent that must be satisfied before the court can grant any relief and it carries sufficient weight in any litigation or dispute processed at that court.

16. I must state from the outset that the Office of the Attorney General is devolved and no sufficient cause has been shown by the state counsel seized of this matter why the statement of defence was not filed within the required timelines.

17. In the instant appeal it goes without saying that the contract in question is not contested. Additionally, it is an admitted fact that the appellant acknowledged the debt and proceeded to make part payments towards settling the decretal sum in fulfilment of the terms agreed upon as evidenced by Payment Voucher No. 651 dated 17.10.2017, 721 dated 21.12.2017, 037 dated 04.01.2018, 106 dated 24.01.2018, 376 dated 07.06.2018, 447 dated 03.07.2018, 349 dated 23.05.2018 and 028 dated 06.02.2019. The resultant is that in the event the trial court would have allowed the defence, the chances of the Appellant's claim succeeding were close to none because of admitted fact of indebtedness accompanied with liquidating the debt by way of instalments. It is also accepted as a fact that a legal practitioner in the shoes of the learned state counsel for the Appellant, she must be held to a higher standard than an ordinary litigant. Reasonably therefore, the assertion that she was aware of the suit papers but simply failed to take positive steps to remedy the situation by filing the statement of defence promptly as is stipulated in the Act could not have constituted a good reason for this court to impugne the default judgment regularly obtained by the respondent. I therefore find that the grounds of appeal given by the Appellant to challenge the trial court's exercise of discretion, not to set aside the default judgment to be unacceptable. Without more, whether the Appellant or his counsel did not attend to the matter as diligently or efficiently as perhaps they should have done is insufficient for this

appeals court to exercise discretion and have the default judgement set aside to return the proceedings to be heard denovo.

18. For all the foregoing reasons, the safe course is to decline to allow the appeal as canvassed by the Appellant and the Respondent shall be awarded costs of this Appeal, which is hereby dismissed for want of merit.

DATED SIGNED AND DELIVERED AT ELDORET, THIS 20TH DAY OF SEPTEMBER 2024

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R. NYAKUNDI

JUDGE

Coram: Before Justice R. Nyakundi

M/s Cheruiyot Melly & Associates Advocates

M/s J.K Oyaro & Associates Advocates

The Hon. Attorney General