Beta Healthcare International Limited v Wesa (Civil Appeal E110 of 2022) [2024] KEHC 12153 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12153 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E110 OF 2022

RN NYAKUNDI, J

OCTOBER 11, 2024

BETWEEN

BETA HEALTHCARE INTERNATIONAL LIMITED ..... APPELLANT

AND

EDWIN KHAKULI WESA ..... RESPONDENT

(Being an Appeal against the Ruling and Order of Honourable Nancy N. Barasa, Principal Magistrate delivered on 14th July, 2022)

JUDGMENT

Representation:

M/s Nancy Njoroge, Kairu & Co. Advocates

M/s Oraro & Co. Advocates

1. This is an Appeal from the Decision of Hon Nancy N. Barasa, Principal Magistrate in CMCC No 237 of 2021 in Eldoret delivered on 14th July 2022 in relation to an application dated 28th January, 2022 seeking stay of judgment and proceedings and set aside the same. The Applicant (now Appellant) also sought an order of leave to file a defence out of time.

2. The background to the underlying litigation is that the Plaintiff/Respondent filed a suit at the trial court seeking judgement against the Appellant for an Road accident that occurred on or about 26th November, 2020 at around 4:00PM or thereabouts at Magut area along Kaptinga-Maili Tisa road when the Plaintiff/Respondent was a lawful passenger aboard motor vehicle registration number KBS 134C when the said motor vehicle being the property of the Defendant (now Appellant) was driven, managed or controlled at that time by itself, its driver, servant or agent during the course and scope of his employment with the defendant so negligently controlled or managed the vehicle causing it to lose

control and veer off the road as a result of which there was an accident causing the Plaintiff to sustain severe injuries.

3. The application was opposed by the Respondent who averred that the application in question was unmerited for reasons that the applicant was duly served with summons to enter appearance and plaint. The trial court considered the application an allowed the same on the following terms and conditions:

    a. The defendant/Appellant was ordered to release to the Plaintiff/Respondent a sum of Kshs. 1,000,000/= within thirty days from the date of the delivery of the Ruling.

    b. The balance thereof to be deposited into a joint interest earning account in the names of the Advocates for both parties within thirty days of the ruling.

    c. In default of any of (a) and (b) above exparte judgment reverts automatically.

    d. Costs of the Application awarded to the Plaintiff.

4. Dissatisfied with the said decision, the Appellant filed the present appeal relying on the following grounds as enumerated in the Memorandum of Appeal dated 27th July, 2022:

    a. The learned trial Magistrate erred in law and in fact in making a finding that the Appellant failed to challenge the Affidavit of Service filed by the Respondent on Service of summons yet the Appellant submitted on that issue in its written submissions denying service.

    b. The Learned Trial Magistrate erred in law and in fact in failing to address the issue of failure to serve the Appellant with a Notice of Entry of Judgement by the Respondent as required by law and service of a hearing notice for formal proof.

    c. The Learned Trial Magistrate condemned the Appellant unheard by allowing the Appellant's application dated 28th January, 2022, which in effect was to set aside the judgment delivered on 14th January, 2022 and then proceeding to order the Appellant to pay Kshs. 1,000,000/= from the decretal sum directly to the Respondent, when the effect of her Ruling is to allow the Appellant to defend itself against the entire amount the judgment.

    d. The Learned Trial Magistrate erred in law and in fact in disregarding the Appellant's written submissions and authorities cited in support of its application.

    e. The Learned Trial Magistrate erred in law and in fact in reaching a decision which falls short of the applicable law and legal principles on setting aside of ex parte judgment.

5. The Appellant having given such grounds proposed orders as follows:

    a. That the Ruling of the Learned Trial Magistrate delivered on 14th July, 2022 be set aside.

    b. That consequent to the setting aside of the said ruling, an order be issued by this Honourable Court allowing the Appellant's application dated 28th January, 2022 on reasonable conditions to be set by this Honorable Court.

    c. That costs of this Appeal and the application in the Trial court be met by the Respondent.

Respondent's Submissions

6. The Respondent filed his submissions dated 21st March, 2024 in opposition to the appeal. Learned Counsel for the Respondent Mr. Kairu identified two issues for determination. The first is whether the interlocutory judgment entered exparte on 14th January, 2022 against the appellant was irregular

and whether the learned trial magistrate applied erroneous laws and legal principles in setting aside exparte judgment.

7. On the first issue, the Respondent submitted that at the trial court, the process server was ready to be cross examined. The Respondent maintained that the Appellant was duly served with the pleadings as per the Affidavit of service. According to counsel, equity does not come to the aid of the indolent but the vigilant. That it was evident from the Appellant's conduct that it was not serious about defending this suit despite being involved in the proceedings.

8. Learned Counsel argued that the test to be applied is whether the appellant honestly and sincerely, intended to defend the suit. Sufficient cause is thus the cause for which the Appellant could not be blamed for his absence. Counsel maintained that no sufficient reasons were advanced by the Appellant explaining the delay in defending this suit. That the Appellant never advanced any cogent reasons or sufficient cause explaining the delay in filing an application to set aside exparte proceedings or delay in filing a defence or generally delay in defending this suit. On this, the Respondent cited the decision in *Gideon Mose Onchwati versus Kenya Oil CO. Limited & Another Nairobi HCC No. 140 of 2008*.

9. The Respondent submitted that the Appellant did not deserve grant of an order to set aside judgment delivered on 4th January, 2022 as prayed in prayer 3 of the application. That a simple reading of the said prayer dictated that the interim order be granted in the interim thus before hearing and determination of the said application. Therefore, the appellant was not well deserving of grant of orders of setting aside judgment delivered exparte on 14th January, 2022 hence the trial court did grant orders not sought in the Appellant's application.

10. On the second issue, the Respondent submitted that the trial court correctly observed that the Respondent had obtained a judgment regularly after fulfilling his obligation his obligation under the law and even had legitimate expectation to enjoy the fruits of the judgment. In support of that, counsel cited the case of Nimraj Limited versus Salama Beach Hotel Limited (2016) eKLR.

11. It was submitted for the Respondent that execution had commenced against the Appellant having paid a further court fees in the sum of Kshs. 66,942/=. That the Appellant failed to obey the ruling of the court delivered on 14th July, 2022 which action caused commencement of execution proceedings against the appellant hence further causing the Respondent to incur unnecessary expenses. That there are no limits or restrictions on the judge's discretion except that if he does vary the judgment on such terms as may be just. Counsel pointed out that the main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the Rules. On this, the case of Patel versus EA Cargo Handling Services Ltd (1974) EA75 at 76.

12. Finally, learned counsel urged this court not to interfere with the exercise of the discretion of the trial court since the Appellant has not satisfied that the trial court in exercising its discretion misdirected itself hence arriving at a wrong decision. That it has not been established that the trial court was clearly wrong in the exercise of its discretion and as a result causing miscarriage of justice.

Issues For Determination

13. Having considered the trial court record, the grounds of appeal and submissions for and against this appeal and cited cases, the only issue I find for determination is whether the Trial Learned Magistrate erred in giving directions as in the Ruling dated 14th July, 2022.

Analysis and Determination

14. 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. (See Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR.)

15. The parties submitted at length both at the trial court and before this court on the question of setting aside judgments. Of importance to the Appellant's counsel was the fact that the Appellant was not properly served with the requisite pleadings and a Notice of Entry of Judgment. Further, the Appellant argued that the Respondent's assertion that they served the Human Resource Manager, one Mr. Bashir is misleading as the said person is unknown to the Appellant

16. The well-established principles of setting aside interlocutory judgments were laid out in the case of Patel v East Africa Cargo Handling Services Ltd (1974) EA 75 as per Duffus P. who stated as follows:

> " The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J, put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

17. It is important to note that there exists a distinction between a default judgment that is regularly entered and one that is irregularly entered. The distinction was discussed in depth by the Court of Appeal in the case of James Kanyita Nderitu vs. Marios Philotas Ghika & Another [2016] eKLR, where it was held:

> " ..... 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 in the whole it is in the interest of justice to set aside the default judgement, among others."

18. The considerations are however different in case of an irregular judgement. The Court stated as follows: -

> " In an irregular 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 justiciae, 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 issues 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)."

19. At this point, I reflect and ask myself whether the impugned judgment in this case was regularly or irregularly entered.

20. I have perused through the record and the same reveals that a request for judgment was made on 21st June, 2021. The same was accompanied by an Affidavit of service sworn by George Rasugu, a court process server who deposed that he served the summons on 10th May 2021 at about 2.30 pm upon one Mr. Bashir who introduced himself as the Human Resource Manager. That the said manager accepted service by retaining their copies summons and signed on top of his copy. Thereafter, the Respondent wrote to the court and requested for a date for formal proof hearing since the Defendant/Appellant to enter appearance within the stipulated time.

21. Order 5 Rule 14 of the Civil Procedure Rules requires the serving officer to exercise reasonable and due diligence to find the Defendant personally. In my understanding, the serving officer must make effort to find the Defendant. The effort made should be demonstrated in the affidavit of service filed. The same was indicated by the Process Server in this case but the Appellant denied the fact that the individual served was not part of Company and therefore the same was not proper service. He further argued that court documents served on the company should bear the Company's seal or stamp for verification purposes. That the Respondent's summons bear not a stamp or seal of the defendant company and therefore the service was improper.

22. On merit I have considered the Ruling delivered by the trial court, the submissions filed on record by both sides, though regrettably the process server was never cross examined to establish the veracity of the averments in the Affidavit of service. In my view, the epicenter and the simple point I am called to determine is whether the defendant/Appellant was properly served.

23. It is the case of the Appellant that the Respondent obtained an interlocutory judgment which is irregular as no service was personally served on the defendant and as such it would be unfair to place in motion execution which is based on irregular judgment. As to whether the said Mr. Bashir is an agent of the Defendant, is an issue that this court cannot clearly establish at this point given the limited pieces of evidence on record. I take note in the trial court's ruling, the trial Magistrate underscored the fact that Appellant/Defendant was served by an authorized court process server, one Mr. George Rasugu who was ready to be cross examined on his affidavit of service but the Appellant avoided the issue of cross examination. The court reasoned that the interlocutory judgment was regularly entered since the Court Process Server's affidavit was explicit and detailed that if it was false and indeed believed to be falsehood by the defence, a cross examination on the same would prove or disprove the defence. Further that ruling noted that the defence did not challenge the correctness of the location of their offices. That the denial of service was a mere denial.

24. Musinga J (as he then was), in the case of Frigonken Ltd vs Value Pak Food Ltd expressed the position in the following terms: -

> " If there is no proper or any service of summons to enter appearance, the resulting judgement is an irregular judgement liable to be set aside by the court ex debito justiciae."

25. The Court of Appeal in the case of Kwanza Estates Limited v Dubai Bank Kenya Limited (In Liquidation) & 2 others [2019] eKLR stated that:

> " The power of the court to set aside an interlocutory judgment under that provision is discretionary. See CMC Holdings Limited vs. Nzioki [2004] 1KLR173. For us to interfere with the exercise of discretion by the Judge, it must be shown that his decision is clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted or because the he failed to take into consideration matters which he should have taken into consideration. [See Mbogo and another vs. Shah [1968] EA 93.]"

26. The Court's power to set aside a judgment is exercised with a view of doing justice between the parties. Reliance is placed on the case of, Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede (1982-1988) KAR, where the Court held:

> " The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties"

27. Curiously, I have sought to peruse and establish the mode of service of the subsequent letter dated 14th January, 2022 informing the Appellant/Defendant of the judgment in place. The leaflet attached does not bear any stamp or seal of the defendant. Therefore, the defendant's denial is still questionable and without cross examining the process server, the same would have no any other way of being established.

28. I appreciate the fact that a decision to set aside a default judgment is a question of discretion. This court ought not to interfere with the discretion of the trial magistrate unless I am satisfied that she was wrong in doing so. That discretion, being wide, the main concern is for the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. It has however to ask itself under what conditions, if any, it ought to set aside the judgement and such conditions, if appropriate, must be just to both the Plaintiff and the Defendant.

29. Whereas the nature of conditions to be imposed by the court in setting aside an ex parte judgement is an exercise of discretion, just like any other exercise of discretion, it must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles. (See Gharib Mohamed Gharib v. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.)

30. I have considered the instant appeal and in my view the condition set by the trial court did not have grounding enough to have justice delivered to both parties. Guided by the above cited authorities and the analysis of the matter before the Magistrate's court, I find merit on the appeal and therefore allow the same with costs

31. Judgment accordingly.

DATED SIGNED AND DELIVERED AT ELDORET, THIS 11TH DAY OF OCTOBER 2024

.....

R. NYAKUNDI

JUDGE

In the Presence of:

Mr. Kavagi, Advocate