Mutisya v Mwangi (Civil Appeal E870 of 2023)
[2024] KEHC 13114 (KLR) (Civ) (4 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13114 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E870 OF 2023

AM MUTETI, J

OCTOBER 4, 2024

BETWEEN

PAUL MUTUKU MUTISYA ..... APPELLANT

AND

NAHASHON NJUGUNA MWANGI ..... RESPONDENT

(Being an Appeal from the Order and Ruling dated 28th July 2023 and delivered vide the Case Tracking System on 2nd August 2023 by Hon. B. Ofisi in SCCC No. E3958 of 2022)

JUDGMENT

Introduction

1. The appellant in this appeal seeks to overturn the Ruling of the Learned Honourable B.J Ofisi in which he declined to set aside a default judgment. The appellant contends that he ought to have been allowed to defend the suit.

2. The appellants memorandum of appeal sets out the following grounds:-

    i. That the Honourable Magistrate erred in fact and in law in finding that the reasons advanced by the Appellant for his failure to enter appearance and file a Response to the statement of Claim are not plausible.

    ii. That the Honourable Magistrate erred in law by finding and holding to that the Replying Affidavit and Supplementary Affidavit filed by the Appellant failed to raise plausible reasons thus denying the Appellant an opportunity to defend the suit as provided for under the Provisions of Order 10 Rule 11 of the Civil Procedure Rules.

iii. That the Honourable Magistrate erred in law and fact in failing to find that Article 159 (2) (d) of *the Constitution* provides that the Courts shall exercise their judicial authority without undue regard to procedural technicalities.

iv. That the Honourable Magistrate erred in law and in fact in failing to find that it was the Appellant's legitimate expectation that his Insurer would respond to the Demand Letter and defend the claim on his behalf before this Honourable Court as he had taken an insurance policy with MUA Insurer.

v. That the Honourable Magistrate erred in law and in fact in failing to appreciate that the Court's discretion to set aside an Interlocutory Judgment is to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error

vi. That the Honourable Magistrate erred in law and in fact in failing to appreciate that the reason for the delay in filling his response was that it was his sincere and mis taken belief that his Insurer, Mua Insuranca Kenya Limited, would take up the matter on his behalf, as he had taken out an Insurance policy with the said Insurance company at the time of the accident.

vii. That the Honourable Magistrate erred in law and in fact in failing to take notice of the Respondent's malicious conduct of filing the Suit only two days after issuance and service of the Demand letter upon the Appellant and its Insurer thus breaching the Appellant's constitutional right to fair hearing and contravening the principle of Natural Justice.

viii. That the Honourable Magistrate erred in law and in fact in failing to appreciate that the Insurer's mistake should not be visited upon the Appellant.

ix. That the Honourable Magistrate erred in law and in fact in finding that the Appellant's mistake is not excusable.

x. That the Learned Trial Magistrate erred when he chose to ignore weighty submissions fronted by the Appellant and recent authorities touching on striking out of pleading thus reaching absurd decisions which has occasioned miscarriage of justice. fact and

xi. That the Honourable Court erred in fact and in law in failing to appreciate that the Respondent will not suffer any prejudice that cannot be ameliorated by an award of costs.

3. The appellant has summarized the issues arising in this appeal as:-

i. Whether the trial Court properly exercised its discretion in denying the appellant the right to have the interlocutory judgment set aside and allowed to defend the suit.

ii. Whether the Court ought to set aside the judgment delivered in the trial Court.

iii. Who should bear the costs of the Appeal.

Analysis and Determination

4. The appeal by the appellant basically challenges the Courts exercise of discretionary power.

5. It is incumbent upon the appellant to demonstrate to the Court that the learned Honourable adjudicator erred in the exercise of judicial discretion by failing to take into account relevant matters or taking into account irrelevant matters thus leading the adjudicator arrive at a wrong decision in law.

6. The appellant would also be successful if he were to demonstrate that the learned Honourable adjudicator misdirected himself in the application of legal principles that bind a Court in considering applications for setting aside of default judgments.

7. The appellant has in his submissions cited the Supreme Court decision in Apungu Arthur Kibira Vs. Independent Electoral & Boundaries Commission & 3 Others [2019] eKLR in which the Court held:-

> " We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of Kacem v. Bashir (2010) NZSC 112; (2011) 2 IVZLR 1 (Kacem) where it was held: "In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (I)error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong."[Emphasis ours]

8. The Supreme Court considered prejudice and caprice in the making of judicial decisions as grounds for invalidating a decision of a judicial officer.

9. The burden is however on the appellant to persuade the Court indeed the decision cannot stand the above stated test.

10. The reasons advanced by an applicant for failing to defend a suit after one is shown to have been properly served, should be compelling enough to persuade a judge on appeal to interfere with the exercise of judicial discretion.

11. The appellant in his submissions admits that there was proper service upon him by way of Whatsapp message send to his number. He also admits that his insurer was well aware of the proceedings and according to him they insurer ought to have taken over the case and defended it on his behalf.

12. The appellant goes further to state that he was under the mistaken believe that the matter would be taken up by the insurer since he was comprehensively insured.

13. The Court further notes that the appellant acknowledges that there was a statutory notice issued to his insurer although he maintains that there was no evidence to show that it ever reached the insurer.

14. The appellant goes further to submit that if the Court finds that the notice was issued and served upon the insurer, the Court should nevertheless find that the same was only served 2 days before the commencement of the suit thereby denying the appellant the opportunity to have the claim settled by the insurer.

15. The Court has noted the extensive submissions by the appellant on the duty of an insurer to the insured but it is not clear to the Court how such arguments are meant to persuade the Court to find in favor of an appellant who willfully failed to defend a suit with the full knowledge of its existence.

16. It is important to point out that where a party is served with pleadings and he willfully and deliberately fails to do anything in defence of the suit, such a party should expect to be visited with all the necessary legal consequences of his inaction.

17. The respondent on his part submits that this Court just like the Lower Court should find and hold that the appellant was duly served thus the interlocutory judgment was properly entered by the Court.

18. The respondent takes the position that the appellants failure to defend the suit was deliberate and should therefore not be countenanced by this court.

19. This Court finds no difficulty in finding and holding that there was service upon the appellant by the respondent and that the appellant simply failed to defend the suit.

20. Although the appellant maintains that he failed to defend the suit under the mistaken belief that his insurer would do so, it is the court's considered view that there was no mistake and that it was a deliberate act on the appellant's part. An honest mistake would no doubt attract sympathy of this court. The circumstances of this matter do not point towards such a mistake.

21. The appellant did not present any material to show any effort that he made to inform the insurer to take up the matter on his behalf.

22. Needless to say, the suit was filed against the appellant in his name and he ought to have known that the judgment that would result from the proceedings would have to be borne by him.

23. In any event the respondent had no means of telling what was the understanding between the appellant and his insurer since he was not privy to their contract.

24. The principles of setting aside an interlocutory judgment were extensively laid in Shah Vs. Mbogo & Another 1967 E.A 116 where the Court of Appeal held as follows:-

> " This discretion (to set aside ex parte proceedings or decision) is intended so 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 has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

25. The Court of Appeal in its decision addressed the question of setting aside in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistakes or error and emphatically made it clear that setting aside should never be used to aid a party who deliberately either by way of evasion or otherwise seeks or intends to delay justice.

26. In the instant case, the appellant has not denied he was aware of the suit. He deliberately chose not to defend it. His action therefore cannot be said to have been an act of mistake or inadvertence but a clear dereliction of his personal responsibility to ensure that the matter was defended.

27. The appellant therefore cannot seek the aid of this court where it is clear that he consciously made a decision to leave the matter to his insurer. The respondent cannot be faulted for moving the Court to enter default judgment since that was his right under the law.

28. Similarly, the Lower court cannot be accused of occasioning an injustice to the appellant by failing to allow the application to set aside the judgment. The appellant has not demonstrated caprice or whimsical approach to the application by the lower court.

29. The appeal therefore does not meet the threshold set by the supreme court in dealing with matters of setting aside at an appellate stage.

30. In determining this matter, I am alive to the fact that interfering with the discretion of a Court is not a light matter. It must be a jurisdiction exercised in the clearest of cases. No doubt this is not one such case.

31. The appellant is seeking an equitable remedy. He must be without blemish in order to succeed. Equity does not aid the indolent. The appellant went about the defence of this suit in very lackadaisical

manner. He took comfort in the fact that he had an insurance cover and so for him it must have been a case of "it is none of my business let the insurance company deal with the matter". The thing he forgot to do, seemingly, was to ensure that the insurer was enjoined as a party to the suit.

32. I am not inclined to grant the appeal for that would in my view amount to denying the respondent the fruits of a properly secured judgment. It is argued for the appellant that there would be no prejudice to the respondent if the judgment is set aside. I do not think so. The respondent continues to spend resources in prosecuting this matter and if this appeal is granted, he would have to go through the rigors of a trial without a justifiable cause. The appellant on the other hand is not without remedy. He can settle the decretal sum and recover the same from his insurer. That in my view evens the scales of justice between the parties.

Conclusion

33. The court is mindful of the requirement to deliver justice expeditiously in keeping with its duty under Article 159 of *the Constitution* of Kenya. The appellant has not demonstrated to me why the Ruling of the trial magistrate should be interfered with. I therefore decline to allow the appeal.

34. The appeal is ordered dismissed with costs to the respondent.

35. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 4TH DAY OF OCTOBER 2024.

A. M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Muthoni holding brief Kimathi for the Appellant

Ms Kyalo holding brief Wanyama for the Respondent