Unjiru Television Network Ltd v Musau & Nzomo (Suing as the administrators of the Estate of the Late Musau Nzeki Nduti) & another; Gotv Kenya Limited (Interested Party) (Civil Appeal 113 of 2019) [2023] KEHC 1213 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1213 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 113 OF 2019

MW MUIGAI, J

FEBRUARY 16, 2023

BETWEEN

UNJIRU TELEVISION NETWORK LTD ..... APPELLANT

AND

NICHOLAS MUSAU & JACKSON MULI NZOMO (SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE MUSAU NZEKI NDUTI) ..... 1ST RESPONDENT

ISAAC MUTUKU NZOMO ..... 2ND RESPONDENT

AND

GOTV KENYA LIMITED ..... INTERESTED PARTY

(An Appeal from the Ruling of Hon. Kibiru – CM at the Chief Magistrate's Court of Kenya at Machakos delivered on the 24th July 2019 in Machakos CMCC No. 357 of 2013)

JUDGMENT

Plaint Dated April 18, 2013

1. The Respondent herein instituted a suit in Machakos CMCC 357 of 2013 against the Appellant seeking the following:

    a A permanent injunction to restrain the defendant whether by itself its agents and/or servants or others whomsoever from remaining on the Plaintiff's Land Machakos/Mua Hills/121 or continuing with wrongful activities thereon or in any other manner howsoever from interfering with the Plaintiff's peaceful possession of his said land.

    b General damages for trespass.

(c) Costs of this suit land interest of the decretal amount at court rates.

2. The Defendant was/is a limited company incorporated in Kenya under the provisions of the Companies Act (Cap 486).

3. That at all time material to this suit the 3rd Plaintiff was and still is the beneficial owner of a portion of land in Mua Hills within the Machakos County being part of the Title number Machakos/Mua Hills/121 which is registered in the name of the 3rd Plaintiff's grandfather one Musau Nzeki Nduti.

4. That sometimes in 2008 the 3rd Plaintiff agreed to lease to the Defendant a portion of the land measuring 100 feet by 100 ft whereupon one David Macharia on behalf of the Defendant undertook to cause a formal lease to be prepared and the said agreed duly signed by the 3rd Plaintiff.

5. That the Defendant took away all the copies of the lease claiming that they were required by his advocate and when he returned them the plaintiff discovered that the lease agreement had been changed into a sale agreement.

Defense

6. The Appellant herein filed their statement of defence and counterclaim dated May 13, 2013 and denied in toto the Respondent averments.

Court Proceedings

7. The hearing commenced on September 12, 2018 in the absence of the Defendant though duly served and a Return of Service filed.

Plaintiffs called 2 witness in support of their case.

8. Pw 1 Isaac Nzomo testified that he is the administrator of the estate of John Musau Ndeti (deceased). That the Defendant/Appellant herein was not entitled to the claim. The developments were made by GoTv not UTV. The property was still in the names of the deceased at time of the agreement.

9. Pw2 Nicholas Nzomo Nzau from Mua Hills stated that he was the 1st Plaintiff. He represented the estate of his father who was deceased. He reiterated the sentiments of the 1st Plaintiff.

10. The defense did not tender any evidence.

11. The Trial Court directed the parties to file written submissions. The Plaintiff filed their submissions, the Defendants did not file their submissions while the interested parties opted not to file any.

Notice of Motion

12. On November 21, 2018 the Defendant filed an application under certificate of urgency and sought the following orders:-

a Spent

b That the Court issues a temporary stay of proceedings pending the hearing and final determination of the application.

c That the Court to set aside the proceedings of September 12, 2018 wherein the Plaintiffs case was heard and further to order the setting aside of the judgment thereupon.

d That the costs of this application be provided for.

13. On November 22, 2018 the Trial Court considered the said application and directed the Defendant to serve the application for *interpartes* hearing on December 4, 2018.

Trial Court Ruling

14. On July 24, 2019 the Trial Court delivered a Ruling in respect of the Application dated November 21, 2019 and gave the following orders as follows;-

    a That the orders of September 12, 2018 closing the plaintiffs and defendants case is hereby set aside.

    b That the Plaintiffs case is hereby re-opened only for the purposes of cross-examining the two witnesses. The two witnesses shall therefore be availed for the said purpose on the next hearing date.

    c That the matter be fixed for hearing on priority basis.

    d That the Applicants shall bear the costs of this application.

Memorandum Of Appeal

15. Aggrieved by the Ruling of the Trial Court delivered July 24, 2019 the Appellant herein filed their Record of Appeal stating the following grounds;-

    i That the learned Trial Magistrate erred in law and in fact in holding that the Defendant/ Applicant deliberately failed to defend the suit before the lower Court.

    ii That the learned Trial Magistrate erred in law and in fact in holding that the Defendant/ Applicant knew of the proceedings before the Court and therefore had themselves to blame for not attending court.

    iii That the Trial Magistrate erred in law and in fact in holding that the Plaintiff's case be reopened only for purposes of cross-examination of two witnesses.

    iv That the Trial Magistrate failed to appreciate that the Applicant had a counterclaim that will be defeated unheard if the orders of the court are not varied.

    v That the Trial Magistrate erred in law and in fact in failing to consider the principles to be followed as far as setting aside proceedings is concerned.

    vi That the Trial Magistrate erred in law and in fact in failing to appreciate the fact that third party directions have not been taken after a third party had been enjoined and therefore the matter before the subordinate court was not ready for hearing when it proceeded.

Submissions

Appellant's Submissions

16. It is submitted that the Appellants herein had a counter-claim to the tune of kshs 17,035,000/- in special damages which they used to develop the property and which they are claiming from the Plaintiffs. They would therefore be the last party to allow the proceedings of September 12 to stand as they were irregularly obtained and would seek this Court's discretion to set aside the whole of the same and the matter to start de novo. The Trial Magistrate erred in law and fact in failing to appreciate this fact.

17. This Court has jurisdiction to exercise discretion and allow for parties to litigate without any party suffering prejudice. In Mulla the Code of Civil procedure has illuminate the grounds for setting aside an *Exparte* decree (in this case proceedings) and what constitutes sufficient cause for setting aside an *Exparte* Judgment/decree. Essentially, setting aside an *Exparte* judgment is a matter of the discretion.

18. In the case of *Esther Wamaitha Njihia & 2 others vs Safaricom limited* [2014[eKLR the Court citing relevant cases on the issue held inter-alia;

> " the discretion is free and the main concern of the Courts is to do justice to the parties before it. 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 sought, whether by evasion or otherwise to obstruct or delay the cause of justice....."

19. Also, in the case of Ongwani vs Owota as quoted in the case of *Captain Philip Ongom v Catherine Nyero Owota* SCCA 14/2/2001 [2003] KALR where the Court held *inter alia* that the Court must be satisfied about one of the two things namely;

a either that the Defendant was not properly served with Summons

b or that the Defendant failed to appear in Court at the hearing due to sufficient cause.

20. It is finally submitted that the Appellant stand to suffer grave prejudice continuing with the suit from where the Plaintiff have already produced documents and had their testimony heard in the absence of the Appellant. The general principle is that an applicant should not suffer due to a mistake of its Counsel. This was the position in *Lee G Muthoga vs Habib Zurich Finance (K) Ltd & Another*, Civil Application No Nai.236 of 2009 where it was held that:

> " It is widely accepted principal of law that a litigant should not suffer because of his advocate oversight....."

Winnie Wambui Kibinge & 2 Others v Match Electricals Limited Civil case 222 of 2010 the Court observed;

> " It does not follow that just because a mistake has been made, a party should suffer the penalty of not having his case heard on merit."

Respondent's Submissions

20. It is submitted that the Appellant was given the opportunity to present his defence for hearing but failed to attend court despite being issued with endless notices to do so. The Appellant did not present any plausible reasons or sufficient cause as to why he failed to present his defence for hearing before the Trial Court. The Appellant received a hearing notice six weeks prior to the hearing date but he never bother to take any steps to make enquiries and/clarification.

21. Reliance is made in the case *Wachira Karani v Bildad Wachira* [2016] eKLR.

22. In the instant case the Appellant acted in a negligent manner. It is the Appellants' averments that it had been served with a hearing notice for the day of the hearing of September 12, 2018 but remained adamant in appearing before Court. The Appellant also failed to follow up on the status of the lower Court's proceedings despite being served six weeks prior to the hearing date.

23. On whether the appellant was accorded opportunity to prosecute its counterclaim, it is trite that when the case was re-opened it would automatically mean that the Defendant/Appellant was accorded opportunity to prosecute its counterclaim on November 21, 2018.

24. On the issue of whether the Court considered the principles to be followed as far as setting aside is concerned in the case of Wachira Karani v Bildad Wachira [2016] *supra* and the case of Esther Wamaitha Njihia and 3 others v Safaricom Limited which stated that;-

> " the discretion is free and the main concern of the courts is to do justice before both parties before it"

25. It is finally submitted that during the Trial Court proceedings all parties were accorded opportunity to comply with pre-trial directions of which actions were done by parties by filing their individual pleadings.

Determination

26. The Court considered the Record of Appeal, the Trial Court record written submissions of parties and the issue(s) for determination are;

    a Whether the Trial Court erred by failing to consider principles offsetting aside proceedings, holding that the Defendant/Applicant deliberately failed to attend Court.

    b Whether the Trial Court erred by reopening the case only for cross examination yet there was a counterclaim.

    c Whether the Trial Court erred proceeding for hearing when 3rd party was joined and 3rd Party directions had not been taken.

Setting Aside Judgment

In the case of *Shah v Mbogo& Anor* [1966] EA 116 the Court set down the criteria for setting aside a judgment as follows:

> " In setting aside judgment, the court must establish: -
>
> 1. That there is a reasonable explanation for any delay;
> 2. That there is a defence on merit;
> 3. That it is just to do so. "

In *Blue Sky Limited EPZ Limited v Natalia Polyakova & another* [2007] eKLR, the Court stated that:-

> " In the case of a defence, a mere denial or a general traverse will not amount to a defence. A defence must raise a triable issue."

Patel v E A Cargo Handling Services Ltd [1974] E A 75 where the court held:

> " In this respect defence on the 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."

In Tree Shade Motors Ltd v D T Dobie & Another [1995-1998] IEA 324, it was held that:-

> " Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the *ex-parte* judgment aside."

Stay of Proceedings

According to Githua J in *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* [2014] eKLR:

> " .....the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principle;
>
> a Whether the applicant has established that he/she has a prima facie arguable case;
>
> b Whether the application was filed expeditiously; and
>
> c Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought."
>
> See Ringera J (as he then was) *Global Tours &Travels Limited*; Nairobi HC Winding Up Cause No 43 of 2000 thus;
>
> > " ....whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously".

27. The Court outlined the above case-law applicable to the grounds of appeal raised by appellant in this case., The Appellant submitted in a nutshell that the Appellant was served with a hearing notice for an application of March 6, 2018 that was to be heard on September 12, 2018 and on that basis the Appellant failed to attend Court as they did not oppose the application to join a 3rd Party/interested Party. The Appellant waited for 3rd Party directions to be granted after the application was granted.

28. The appellant was surprised that the Trial Court proceeded with hearing of the substantive matter and the Appellant received a judgment notice on November 21, 2018. The Appellant was apprehensive especially when there remains to be heard and determined the Counterclaim for Ksh 17,035,000/- in special damages which was used to develop the property and are/were claiming the same from the Plaintiffs.

29. The Respondent countered the Appellants position that the Defendant/Appellant was given an opportunity to present his defense for hearing but failed to attend Court despite being issued with endless notices to do so. Secondly, the Appellant failed to present plausible reasons or sufficient cause as to why he failed to present his defense.

30. The Court gleaned through the Court proceedings on May 23, 2018, 1st Defendant's Advocate was present and the application of March 6, 2015 to join interested party was granted as there was no objection. The interested party was to be served. On July 4, 2018, there was no appearance for the Defendant and the interested Party had not filed pleadings and the matter was deferred to September 12, 2018 for hearing.

31. On September 12, 2018, Counsel for Plaintiff confirmed service of hearing notice to the Defendant and an Affidavit of Service was filed on September 10, 2018 to confirm service. The hearing proceeded with 2 witnesses and the Defense case was closed on application by Plaintiff's Counsel and written submissions were to be filed. On October 9, 2018, there was no appearance by the Defendant or his advocate.

32. On November 21, 2018 the matter was scheduled for judgment, Counsel for the Defendant wrote to the Trial Court explaining their predicament.

    The Trial Court considered the application and confirmed from the record that the Hearing Notice was for the application to join interested party not for hearing of the Suit. The Trial Court noted that the Affidavit of Service filed on July 10, 2018 indicated hearing was for the application of March 6, 2018 and not the hearing of main suit. The Trial Court found that the application of March 6, 2018 was granted on May 23, 2018 when Defendants and interested Parties were represented.

33. The Trial Court found the proceedings to be regular and the Defendant was not diligent in pursuing the matter. The Trial Court stayed the writing and delivery of the judgment and granted the Defendant a date to cross-examine the 2 witnesses who testified and not to present their case. The Defendant sought the previous proceedings set aside and matter started de novo. The Trial Court allowed the Defendant to file the application whose Ruling is the subject of the appeal.

Fair Hearing

Hon Korir J in *Republic v Kenya Power & Lighting Company Ltd & another* [2013] eKLR expressed himself as follows:

> " I think the words of Lord Greene, M R at page 229 in the Wednesbury Corporation case will make good closing remarks in this case. He observed that:-
>
> 'It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably."
>
> The Court, in Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another [2018] eKLR, had the following to say on Article 50 CoK 2010, with respect to fair trial principles in civil cases:
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> " While the wording of Article 50 of the *Constitution* on the right to a fair hearing prima facie seems to focus on criminal trials it's not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be

informed of the claim in advance before the suit is filed, the right to a public hearing, and the right to be heard within a reasonable time."

11. The Court went on to state:

> "... it is important that in any judicial process adjudication parties involved be given opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system.
>
> Although in particular circumstances errors, omissions, missteps and blunders are made by parties or their counsels during pretrial or in the course of trial to find appropriate balance fundamental requisite of due process of law should be accorded a purposeful meaning to protect right to a fair hearing. The *Civil Procedure Act* and Rules provides for time-frame rules and commitments for parties to comply with discovery; dates for closure of pleadings, filing of witness statements, production of expert material where applicable, scheduling of cases and disposition dates. Needless to say that all these commitments are aimed at each litigant to have adequate notice and fair understanding of the litigation road ahead of time disposition ..."

34. The Appellant Applicants sought to have the proceedings set aside, the Court took the view that it was manifest that the Defendants were not diligent in pursuit of their matter. No reason was given why they did not appear in Court and the matter had been in Court since 2013.

    The Defendant was aggrieved and declined to comply with the orders granted that the proceedings would be reopened for cross-examination of the 2 witnesses only.

35. The Court shall ringfence Article 50 &159 *CoK 2010* & Section 1A 1B & 3A CPA that comprise of the due process and fair play in expeditious disposal of cases and maintaining administration of justice. The law protects both /all parties for justice to be seen to be done.

36. In the instant matter, the Appellant's quest is that non-attendance to Court proceedings was occasioned by the Hearing Notice served that intimated the hearing was of an application to join an interested party which the Defendant had no objection to. The issue of Service housed by Order 5 *CPR 2010* is central to rules of natural justice that a party ought to be notified in advance the claim, dispute or proceedings at hand and afforded an opportunity to be heard and not condemned unheard.

37. Therefore, the Plaintiff/Applicant ought to have owned up the possibly genuine mistake in serving a Hearing Notice for hearing of an Application and not the main suit and ceded ground to halt the proceedings to enable the Defendant prepare for the intended hearing. I find it unfair to visit blame on the Trial Court that had no bearing with regard to the content and process of service save to confirm service by filing of Affidavit of Service in Court by Parties.

38. Since, the Appellant's assertion that the Hearing Notice served was misleading as the Trial Court confirmed from the record that it referred to hearing of an application the Defendant did not oppose hence their absence and this fact was not controverted or challenged by any evidence on record, I find the reason for non- attendance plausible and not that the Defendant /Appellant was not diligent in pursuing its claim in Court.

39. The proceedings by virtue of improper service were mired with irregularity that require to be regularized. With respect, although the Trial Court was on point by halting proceedings and delivery of judgment to allow the Defendant cross examine the 2 witnesses, the Defendant remained apprehensive of the fate of its counterclaim already filed and on record.

40. Guided by cases; *Phillip Kiptoo Chemwolo & Mumias Sugar Company Limited v Augustine Kubede* [1882-1988] KAR where the Court held thus;

> " 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"

Jomo Kenyatta University of Agriculture & Technology v Musa Ezekiel Oebal [2014] eKLR the Court stated that the purpose of clothing the Court with discretion to set aside *ex-parte* judgment is;-

> " To avoid injustice or hardship resulting from accident, inadvertence of excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice."

Disposition

1. The appeal partly succeeds and partly fails.
2. The Ruling of the Trial Court of July 24, 2019 to halt proceedings and delivery of judgment and allow the Defendant to cross examine the 2 witnesses is proper in law and is upheld. Ideally, Pre-Trial /Case management was done and parties exchanged documents, statements etc and witnesses relied on their statements during trial.
3. The Ruling did not provide for the fate and/or hearing of the Defendant's Counterclaim which this Court hereby grants to be heard *interpartes* upon resumption of the hearing.
4. Costs in the Cause.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS ON 16TH FEBRUARY, 2023 (VIRTUAL/PHYSICAL CONFERENCE)

M W MUIGAI

JUDGE

IN THE PRESENCE OF:

Mr Macharia for the Appellant

Mr Mutua - for the Respondent

Patrick/Geoffrey - Court Assistant(s)