Akamba Public Road Service Limited v Ochieng (Civil Appeal E064 of 2021) [2023] KEHC 1768 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1768 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E064 OF 2021

FROO OLEL, J

MARCH 16, 2023

BETWEEN

AKAMBA PUBLIC ROAD SERVICE LIMITED ..... APPELLANT

AND

MARTIN OCHIENG ..... RESPONDENT

(Being an appeal from the ruling/orders of Hon. Bidali, Chief Magistrate, Naivasha, delivered on 29th September 2021 in Naivasha CMCC no.610 of 2012.)

JUDGMENT

1. This appeal arises from Ruling/Order of Hon. K Bidali Chief Magistrate delivered on 29th September, 2021 in Naivasha CMCC no.610 of 2012 where he dismissed the applicants application dated 22nd April 2021 seeking to set aside exparte judgement dated 11th May 2015 and allow the defendant/ applicant to unconditionally defend the cause of action.

2. The Respondent herein had filed civil suit Naivasha Civil suit no.610 of 2012 against Akamba Public Road Services Ltd on behalf of the estate of the late Francesca Waga Mwandia. The matter proceeded exparte due to failure by the defendant therein to enter appearance and/or file a statement of defence as is required in law.

3. In the application filed before the magistrate court, the appellant averred that they were not served with summons to enter appearance, they have a defence which raises triable issues, the entire proceedings were marred by a plethora of irregularities and illegalities most notably that the defendant/applicant had closed shop and was under receivership which facts were well within public knowledge and notoriety and thus the exparte judgment was obtained irregularly, un-procedurally and illegally and ought to have been set aside.

4. The Respondent in this appeal opposed the said application to set aside judgment. They stated that proper service was affected upon the defendant by one Mark Okinda, a licensed process server on 23rd August 2012 and his affidavit of service was filed in court on 29th January 2013. The defendant also averred that they sent a statutory notices to the plaintiff's insurer G.A Insurance Company Ltd vide a notice dated 30th August 2011 and that the said notice was filed in court contemporaneously with the plaint when filed. Further a letter dated 4th April 2017 was also sent to the said insurance company G.A Insurance Company Ltd, calling upon them to satisfy the judgment entered against their insured.

5. The respondent stated that the insurer and insured did not react to the summons served and statutory notices issued and thus judgment entered was regular and should not be set aside.

6. The Respondent also stated that Principal suit was filed before the defendant and was placed under receivership and therefore they did not need leave to file the same.

7. Finally the Respondent questioned the locus standi of G.A Insurance Co Ltd to proceed with a suit on behalf of Akamba Public Road Services Ltd which had been wound up. They also stated that the defendant/applicant could not raise the issue of limitation more than a decade later, when they had neglected to defend the suit.

8. The trial magistrate upon considering the application and submissions filed did find as a fact that the appellant were properly served and did not enter appearance and/or filed a defence as expected. Secondly, there was no order of court placed in the court file confirming that the applicant was placed under receivership and finally it was uncontested the applicant was served with demand notice dated 30.4.2017 and it made reference to the statutory notice dated 30. 8. 2011 which, demand letter was not rebutted or denied and thus the court could not exercise discretion in their favour.

9. Being dissatisfied with the said ruling, the appellants opted to prefer this appeal and filed their memorandum of appeal dated 22nd October 2021 which raised to ground of appeal namely:-

    i. That the Learned Magistrate erred and misdirected himself on the principles applicable in setting aside an exparte judgement and in failing to set aside the exparte judgement dated 11/5/2015.

    ii. That the learned magistrate erred in law and in fact in failing to find that Respondent had a formidable defence which raised multiple triable and weighty issues.

    iii. That the leaned magistrate erred in law and in fact in failing to find that the defendant was under receivership at the time of filing of Naivasha CMCC no.610 of 2012.

    iv. That the learned magistrate erred in law and in fact in failing to find that the Respondent herein needed leave to institute Naivasha CMCC No.610 of 2012 against the appellant who was under receivership.

    v. That the learned magistrate erred in law in failing to find that the Respondent herein did not obtain the leave of the court to continue with Naivasha CMCC no 610 of 2012 against the appellant who was under receivership.

    vi. That the learned magistrate erred in fact and in law in failing to find that the Appellant herein was wound up.

vii. That the learned magistrate erred in law and in fact in failing to find that the exparte judgement was entered against a party who had been wound up.

viii. That the learned magistrate erred in fact and in law in finding that the Appellant's insurer was notified of the existence of Naivasha CMCC no.610 of 2012 through a statutory notice dated 30/8/2011 one year before the suit was actually instituted.

ix. That the learned magistrate erred in law and in fact in failing to find that the cause of action was statutory time barred at the time of its filing.

x. That the learned magistrate erred in law in failing to determine whether or not the claim was statutory time barred at the time of its filing.

xi. That the learned magistrate erred in law and in fact his analysis of the evidence presented before him

xii. That the learned magistrate erred in law in failing to determine weighty and highly contested issues pertaining the main suit in an interlocutory application.

Appellant Submissions

10. The appellant submitted that the trial magistrate misdirected himself on the principle applicable in setting aside an exparte judgement and did not properly consider that the Appellant were not properly served with summons to enter appearance and further that they had a formidable defence against the plaintiff claim which defence raised triable and weighty issues and thus they ought to have been given a chance to fully canvass the same during trial.

11. Secondly, the appellants submitted that the trial court only considered the reasons why the defence was not filed and did not consider whether the defence raised triable issues which were; the suit was time barred at time of institution, whether the honourable court had jurisdiction to hear and determine the suit and whether there was a moratorium against continuity or instituting a suit against a company that is under receivership. Further the appellant submitted that the court erred to make a determination on the merits of the triable issues as opposed to making a determination on whether the defence raised triable issues. They cited with approved in case of Tree Shade Motors Ltd versus O.T Double and another (1995 – 1998) EA 327, Pwani United builders Ltd and another versus Waterways (Coast) Ltd 2021 eKLR and Job Kioch versus Nation Media Group Ltd, Salaba Agencies Ltd and Michael Riomo (2015) eKLR.

12. The appellant reiterated that the defence company was placed under receivership and that was a fact well within public knowledge and notoriety. That there were gazette notice no.7235 and 7532 and judgment in Judicial review no.26 of 2014 which provided over whelming evidence that the appellant had been placed under receivership and the company wound up by the time expert judgment was delivered. The court noted that the appellant did not file in any of its pleading the 'receivership order' but in their submissions the appellants stated that it was issued on 19/6/2012 or 26/09/2022 and relied on the citation of Republic versus Department of labour and 3 others exparte Philip Omondi (2016)eKLR where it was stated that the company had been placed under receivership on 19/6/2012 and an official receiver appointed in interim liquidator.

13. The third issue raised by the appellant in their submissions was that the primary suit was filed without leave and was time barred as the plaintiff did not seek did not seek leave of court to institute the suit

out of time as is statutorily required by provisions of section 27, 28 and 29 of the *limitation of Actions Act* Cap 22 Laws of Kenya.

14. The appellant also submitted that the appellants insurer were never notified of the existence of the suit and/or exparte proceedings and further that the statutory notice that was annexed to the plaint was incapable of being acted upon by the defendant's insurer as it was camouflaged as a demand letter and was issued on 30/8/2011 (one year) before the suit was filed and thus could not be defied as a statutory notice contemplated under section 10 of the Insurance (Third party risk) Act Cap 405.

15. The appellant concluded by stating that the trial magistrate did not properly evaluate and consider the facts and evidence presented before him and thus this appeal should be allowed.

Respondents Submissions.

16. The Respondent stated that there was a clear distinction between a petition to wind up a company and a court order directing the winding up of a company. A cursory look at the gazette notice's attached by the appellant clearly showed that the same were merely notices of petition for winding up having been filed/initiated but could not be said to be proof of the appellant company having being wound up. The Respondent relied on the case of Intone Ranch Ltd versus O' Brian (1992) KLR where it was held that "winding up order is not automatic, there must be proof of insolvency and/or inability on the part of the company to pay its debts." The Respondent submitted that the appellant failed to prove that the appellant was in receivership as at the time the suit was filed and/or proceeded and thus they did not need leave of court to file the suit.

17. Secondly, the Respondent stated that proper service of summons was effected on 23rd August 2012, the same date the plaint was filed. Service was effected at the company offices and it was incumbent up them to act appropriately and defence their interest. That having complied with order 5 Rule 3 and 15 of the civil procedure rules, the argument of not being served was unfounded and should be dismissed.

18. On the suit being time barred, the Respondent did submit that time did not start to run until the Respondent had reached the age of majority and this was a disability by virtue of Section 2(2) of the Limitation of Action Act. In 2012 when he reached the age of majority they initiated the process of obtaining grant of representation and filed the suit within the prescribed period.

19. That section 2(2) of the limitation of Acts, Act is to be read together with section 27 of the same Act which grants a person under disability six years within which he could bring his claim. The suit having been filed in 2012, thus was well within the time limit and it could not be argued that the suit was time barred.

20. The Respondent further submitted that trial court could not address the issue of jurisdiction by way of an application to set aside judgement because by doing so, the court would in effect be expected to change its mind with regard to a judgment already delivered and was already fanctus officio. They relied on the case of Raila Odinga and 2 others versus IEBC and 3 others (2013) eKLR and George Wekesa versus Multi Media University of Kenya (2021) eKLR, to buttress this point.

21. In conclusion the Respondent urged this court to dismiss this appeal and order 'that the insurance company focus its energy to defending the declaratory suit against it.'

Analysis and Determination

22. I have considered the application as filed, the supporting affidavit and submission filed both before parties at the trial court and those filed in this appeal and will consider the whole matter to fresh scrutiny and arrive at its own conclusions.

23. As held in Selle and another versus Associated Motor Boat Co. Ltd and others (1968) EA 123 where it was held that;

> " I accept counsel for the Respondent, preposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from and enabled by the high court is by way of retrial and the principles upon which this court acts in such in appeal are well settled. Briefly puts they are that this court must reconsider the evidence, evaluate it, itself and draw its own conclusion though it should already bear in mind that it has neither seen nor heard the witnesses and should make dire allowances in this respect. In particular, this court is not bound necessarily to follow the trial judge's finding of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances of probabilities materially to estimate the evidence or if the impression based on the demean or of a witness is consistent with the evidence in the case generally (Abdul Hemmed Self versus Ali Mohammed Sholan 1955, 22 E.A.C.A 270).

24. Also it was held by the court of Appeal in Ephantus Mwangi & Another Vs Duncan Mwangi Civil Appeal No 77 of 1982 (1982-1988) 1KAR 278 that;

> " A member of the appellant court is not bound to accept the learned judge's finding of fact if it appears either that(a) he has clearly failed to consider some point to take account of particular circumstance's or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

25. The sole issue of contention is this appeal is whether the trial magistrate exercised his discretion correctly in refusing to set aside exparte judgement dated 11th May 2015.

26. It is common ground that setting aside an exparte decree is a matter of discretion of the court in the case of Esther Wamaitha Njita and 2 others versus Safaricom Ltd that the court cited relevant authorities on the issue held inter alia that;

> " The discretion is free and the main concern of the courts is to do justice to the parties before the court (see Petal versus E.A Cargo handling services Ltd). The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it 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 versus Mbogo). The nature of the action should be considered, the defence if any should be considered and so should the question as to whether the plaintiff can be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court (see Sebei District Administration versus Gasyali). It also goes without saying that the reason for failure to attend should be considered."

27. The other issue which arises when the court is to consider whether to set aside expert judgement or not is if the applicant has shown "sufficient cause" why exparte judgement should be set aside. In the case of the Registered Trustees of the Arch Diocese of Dar es salaam versus the Chairman Bunju Village Government and the court discussed what constituted sufficient cause. It stated;

> " It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however that the words should receive a liberal construction in order to advance

substantial justice when no negligence or inaction or want of bona fides is imputed to the appellant."

28. In Daphene Perry versus Murry Alexander Carson (1962) E.A 515 the court did hold that;

> " Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient cause' its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for delay, the court must guard itself against the danger of being away by sympathy..."

29. Finally in the Supreme court of India in the case of Parimal versus Vcene observed that;

> " ...sufficient caused means that a party has not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been ' not acting diligently' or remaining inactive'. However the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reasons that whenever the court exercises discretion it has to be exercised judiciously."

30. It should also be born in mind that, whenever the court is invested with discretion to do certain act as mandated by statute, the same has to be exercised judiciously and not in an arbitrary manner. The classic definition of discretion by lord Mansfield in Republic Versus Walkers (1770)4 Burr 2527, 2539:98ER was that discretion when applied to the courts of justice, means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful but legal and regular. Also as stated in the Kings Bench in Rookey's case that;

> " Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by the rules of law and equity,, which are opposed, but each, in turn, to be subservient to the other. This discretion in some cases follows the law implicitly, in others or allays the rigor of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity is by constitution entrusted with".

31. The appellant raised twelve (12) ground of appeal which this court has considered and will be looked at jointly within the law that regulates setting aside of expert judgements.

32. I do also note that grounds 3,4,5,6,7,8,9 and 10 of the ground of appeal relate to triable issues raised in the proposed statement of defence filed. At this stage of setting aside judgment that trial court is only obliged to consider whether or not the proposed defence raises any triable issues. The court does not to consider the merit of the same. Both the appellants and Respondent have submitted at length into the merits of the triable issues raised. It was unnecessary to argue the merit of the said triable issues and this court will not make any determination on the same.

33. On ground 1,2,11 and 12 of the ground of appeal, the appellant stated that the magistrate erred and misdirected himself on the principle applicable in setting aside expert judgment and by also failing to find that the Respondent had a formidable defence which raised triable and weighty issued and this ought to have allowed the application.

34. The well-established principle of setting aside interlocutory judgements were laid in the case of Patel versus East Africa Cargo Handling services where duffus VP stated;

> " The main concern of the court is to do justice to the parties and the court will not impose condition on itself to fatten the wide discretion given to them by the rules. I agree that where it is a regular judgement as it is the dace here the court will not usually set aside the judgment unless it is satisfied that there is a defence on merits. It his respect defence on merit does not mean in my view a defence that must succeed. It means as Sheridin J puts it, it must raise a 'triable issues' that is an issue which raised a prima facie defence and which should go to trial from adjudication.

35. Thus issue which this court has to consider before exercising its unfettered discretion is;

    a. The main concern of court is to do justice to the parties before it.

    b. The discretion is intended to be exercised to avoid injustice on hardship resulting from an accident inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought whether be evasion and otherwise to obstruct or delay the causes of justice (see shah versus Mbogo).

    c. The cause of action and defence (if any) is filed too should be considered.

36. It is not in doubt the defendant/ applicant was duly served with summon to enter appearance by Mark Okinda (a licenced process server)who effected service by personally serving a secretary working at the defendant head office situated off Lagos road in Nairobi Industrial area. This was proper service as envisaged under provision of Order 5 Rule 3 of the Civil Procedure Rule.

37. The Appellant in their supporting affidavit did allege that the defendant was never regularly and effectively served with summon to enter appearance and/or pleadings relation to this suit I do agree with the finding of the trial court that the appellant was properly served. In any event, the deponent of the affidavit Sharon N Mukania did not work with the applicant company as at 23rd August 2012 when service was effected, and it was not within her knowledge to depone to such facts.

38. The second issue this court is to consider is whether the appellant defence raised triable issues. The applicant submitted that the defence as filed did raise several triable issues which would require further interrogation by court during full trial. The issues raised were that, the primary suit was time barred having been filed out of time and without leave of court. Secondly, whether the court has jurisdiction to hear and determine the suit and if the proceedings were void abinitio. They also raised the issue of whether there was a moratorium against continuing or instituting a suit against a company that is under receivership.

39. The appellants stated that the proposed defence raised serious triable issues which were weighty and the court wrongly considered the reasons why the defence was not filed and did not consider whether the defence raised triable issues, thereby falling into error in making such a determination on whether the defence raised triable issues.

40. The appellant is right when they stated that the court is not required to look into the merits of the defence file. The court only has to consider is and identify if the defence as filed raises triable issues and if it does the court need to exercise its discretion in such a manner as to avoid injustice or hardship resulting from an accident, inadvertence and excusable mistake or error. See Patel Vs E.A Handling Services Ltd (1974) E275, Tree Shade Motors Ltd versus D.T Dobie company Ltd. CA 38 of 1998 and Mania versus Muriuki (1984) KLR

41. I do find that the issues raised in the proposed statement of defence were serious and raised prima facie triable issues which should be determined at trial.

42. The final issue to consider is whether there is a reasonable explanation for the delay in filing application to set aside judgement and whether there would be any prejudice to the respondent if the judgment is set aside and/or to the applicant if not set aside.

43. The exparte judgment as against the defendant was entered on 11th May 2015. The applicant did file this application to set aside judgements on 22nd April 2021 which is six (6) years after the suit had been finalized.

44. In the said application the applicant averred that the defendants were never served with summons to enter appearance and therefore judgment was obtained irregularity. Secondly the applicant stated that the defendant (insured) did not inform the insurer – G.A Accident Insurance Company Ltd of the existence of this suit nor did they report the occurrence of the accident. Further applicant/insurer stated that they only did get to know of the existence of the suit when the Respondent did file a declaration suit to enforce judgment delivered in Naivasha CMCC 563/2019.

45. The appellant also stated that the failure by the defence and/or its insurer to file a statement of defence and to defence the primary matter was unintended, and inadvertent.

46. The Respondent on the other end stated that before filing of the suit his advocate on record did serve an statutory notices dated 30/8/2011 upon the appellant insurer and which notice was contemporaneously filed with the plaint and stamp accordingly. Secondly, the Respondent also stressed that through a letter dated 4th April 2017, his Advocate on record called upon the insurer to satisfy the decree but they chose to ignore the same.

47. It was thus the Respondent contention that the appellants were in court with un-clean hand in equity as they deliberately sought to delay and frustrate the conclusion of this matter. Further it was the Respondent contention that the appellant did not offer any explanation as to why from April 2017 when they were served with the demand letter dated 30.4.2017 , they opted to keep quiet until April 2021 when awoken from their slumber by the declaratory suit. This court also noted that the demand letter dated 4th April 2017 was specifically served upon the appellant insurer and was stamped and duly received on 3rd April 2017.

48. The appellant both in the supplimentary affidavit filed and submissions did not explain why they delayed for a period of four (4) years before seeking to set aside regular judgement. In Mohamed and another versus Shoka (1990) KLR 463 and Jomo Kenyatta University of Agricultural and Technology –versus- Musa Ezekiel Debal (2014) eKLR, the court emphasized the need to explain the delay and not to exercise discretion to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.

49. The court in the case of Richman versus Rahman(1999) LTL 26/11/9 t did considered the issue of discretion to set aside a default judgment and conclude that the elements the judge had to consider were; the nature of defence, the period of delay (i.e why the application to set aside had not been made before), any prejudice the claimant is likely to suffer if the default judgment was set aside and the overriding objectives.

50. It is also worth repeating what was stated in Daphene Perry versus Murry Alexander Carson (1962) E.A 515 that

> " though court should 'no doubt' giving a liberal interpretation to the words 'sufficient cause' its interpretation must be in accordance with judicial principles if the applicant has a good case on the merits and has no valid excuse for the delay, the court must guard itself against the dangers of being led away by sympathy..."

51. The appellant despite being served in April 2017 have not explained why it took them 4 years to come to court seeking to set aside judgment. The period of four (4) years which is unexplained is inordinate and mitigates against granting of the orders sought as against the appellants.

52. In Royal Trading Company Ltd versus Bank of Baroda and Tetezi house Ltd (2018)eKLR, the court held that;

> " It is an old adage that justice delayed is justice denied and that justice weighed on a scale that merit balance. Therefore as much as the court is obliged to promote the provision of Article 159(2)(d) of *the constitution* of Kenya 2010 and uphold substantial justice as against technicalities the law must protect both the applicant and judgement creditor for justice to be seen to be done. Even then a mistake by a counsel is not a technicality. In the same vein the provisions of Section 1A and 1B of the *Civil Procedure Act* obligates the parties to assist the court in the expedition disposal of cases."

53. I do find that failure of the applicant to explain why they waited for four (4) years before seeking to set aside judgement is fatal to their application. The Respondent will clearly be prejudiced to restart a suit, which the appellant knew about but opted for reasons best known to then, not take action to protect their interest and that of the insured.

54. The applicant still will have an opportunity to raise some of the issues canvassed in the proposed defence while defending the declaration suit and thus will be less prejudiced. On the other hand, If it is proven than the appellant is under liquidation then judgment credit will be unable to proceed with his suit afresh and will probably be locked out from the seat of justice due to circumstances not of his making yet he diligently followed the right procedure and got judgment entered in his favour.

Conclusion

55. I therefore find that this appeal is not merited and the same is dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF MARCH 2023.

FRANCIS RAYOLA

JUDGE

In the presence of;

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