Mwangi v Ndungu & another (Suing as administrators of the Estate of the late Michael Mwangi Ndungu - Deceased) (Civil Appeal E115 of 2021) [2023] KEHC 2142 (KLR) (6 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2142 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E115 OF 2021

JM CHIGITI, J

MARCH 6, 2023

BETWEEN

MOSES ITOTIA MWANGI ..... APPELLANT

AND

JULIET WANJIKU NDUNGU & JOSEPHAT KANGETHE NDUNGU ..... RESPONDENT

SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE MICHAEL MWANGI NDUNGU - DECEASED

JUDGMENT

Brief Background

1. The Appellant filed a filed a Notice of Motion application on January 27, 2021 under order 51 rule 1/order 42 rule 6 of the *Civil Procedure Rules* and section 1A, 1B and 3A of the *Civil Procedure Act* seeking inter alia:-

    a. An order that the proceedings of December 17, 2020 and the judgment of the Court delivered on 4th February 2021 be set aside; and

    b. That the Appellant be granted unconditional leave to defend the suit.

2. The application was supported by the affidavit of Catherine Njogu wherein she deponed that the matter proceeded into hearing in the absence of the Appellant's counsel.

3. Judgment was thereafter delivered on 4/2/21. The Appellants averred that their advocate arrived in court at 11.23 am assuming that the matter would first be mentioned online with a mistaken view that thereafter the court would first assign time before the hearing commences as is the practice in most courts.

4. The Application was vehemently opposed.

5. In the ruling, the trial magistrate held the position that the prayers being sought by the Appellant are discretionary and therefore the court has to make a determination as to whether the reasons given for not attendance of court on 17/12/2020 was excusable or not.

6. The Court relied on the authority of *Wachira Katani v Bildad Wachira* [20161 eKLR where the court quoted the case of *Esther Wamaitha Niihia & two others vs Safaricom Ltd* (2014) eKLR which 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 (see Patel vs EA. 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 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 vs. Mbogo.) The nature of the action should be considered the defence if any should also be considered and so should the question as to whether the plaintiff can reasonably 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 vs Gasyali)."

7. The power of setting aside is a discretion of the court and it is not disputed. According to the Appellant the issue was whether or not the Applicant's counsel had demonstrated "sufficient cause for failing to attend court.

Analysis and determination:

8. This court is the first appellate court. Its duty is to evaluate the entire evidence on record bearing in mind it had no advantage of seeing the witnesses testify. In the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held:

> " This being first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

9. According to the Respondent, the Appellant in this case was given an opportunity to be heard when the matter was listed for hearing, however the appellant failed to attend court as expected.

10. The Respondent further submitted that the Respondent should not be forced to suffer due to consequences of the negligence of the Appellant. He relied on the case of *Kamorinjithi v David Munene; Pauline Wangithi & 4 others (Interested Parties)* [20211 eKLR where the court held:

> " That the overriding objective under Section IA of the *Civil Procedure Act* Chapter 21 Laws of Kenya is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes in our Courts."

11. According to the Respondent, the application was a ploy engaged by the appellant and delay tactics that are meant to delay the court process and to deny the Respondent the fruits of his judgment.

12. As was held by the Court of Appeal in *CMC Holdings Ltd vs. Nzioki* [2004] KLR 173:

> "In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error."

13. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle.

14. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date and for that reason the hearing took place ex parte and the effect of the same was an ex parte judgement was entered as a result of the non-appearance of the appellant.

15. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here.

16. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate.

17. The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues.

18. The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues.

19. The Court has wide discretion in such cases to set aside ex parte judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard ex parte and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case.

20. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input.

21. What the Trial Court should have done when hearing the application to set aside the ex parte judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim.

22. If the same was raised, then whether the reasons for the appellant's appearance were weak, the magistrate was law bound to exercise her discretion and set aside the ex parte judgement so as to allow the appellant to put forward its defence.

23. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned magistrate should not have considered what the learned trial Court had

concluded on the evidence before her but should have in the same way looked at the pleadings and considered whether triable issues were raised by the defence and if so, then the appeal should have been allowed.

24. In the case of *Gerita Nasipondi Bukunya & 2 others v Attorney General* [2019] eKLR that:

> " There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

25. In the case of *Philip Chemowolo & Another –vs- Augustine Kubede* [1982-88] KAR 103 at 1040 Apalloo, J. A (as then was) stated as follows:-

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."

26. Mistakes do occur in the process of litigation was also appreciated by the Court of Appeal in *Murai vs. Wainaina (No. 4)* [1982] KLR 38 where it was held that:

> " A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of Justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of Justice themselves make mistakes which are politely referred to us erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule."

27. This reprieve will however not be granted without any conditions on the part of the appellant who have clearly been indolent in their handling of the case. In the case of *Rayat Trading Co. Limited vs Bank of Baroda & Tetezi House Ltd* [2018] eKLR where the Court held that: -

> " If the court sets aside a default judgment, it may do so on terms. In most cases the defaulting defendant will be ordered to pay the claimant's costs thrown away."

28. In the ruling dated May 25, 2021, the trial Magistrate made reference to the following authorities: *Prime Bank Limited v Paul Otieno Nyamodi* (2014) eKLR and *Wachira Korani v Bildad Wachira* [20161 eKLR.

29. The magistrate went ahead to analyse the term "sufficient cause" quoting the Supreme Court of India in the case of *Parimal vs Veena* which observed that: -

> " sufficient cause' is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary

to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context/ "sufficient cause" means that party had 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 reason that whenever the court exercises discretion, it has to be exercised judiciously"

30. Therefore,court while deciding whether there is a sufficient cause or not, must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgement impugned before it.

31. The trial court concluded her journey in the analysis of what informed the refusal to grant the orders sought. As follows I have considered the grounds for the application herein and the authorities cited by the respective advocates and I am well guided. From the record this suit was coming up for hearing on 17/12/2020 at 9.00 am but the defendant and her Counsel were not present as at 9.25 am when the suit was heard.

Disposition:

32. The Learned Trial Court limited its analysis of whether or not to exercise its discretion to the none attendance of counsel only. The trial court did not sufficiently, address itself fully to the principles that govern setting aside of judgments and hence misdirected itself in the exercise of its discretion.

33. In the case of, *Thorn PLC vs Macdonald* [1999] CPLR 660, the Court of Appeal highlighted the following guiding principles:

    a. While the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant. The trial court failed to appreciate that the Appellant eventually attended court and acted swiftly in filing the application with due dispatch.

    b. Any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside. The trial magistrate failed to appreciate this. The court was extremely limited and narrow in its reasoning. She anchored herself to the wording in her ruling when she made a finding that, from the record this suit was coming Up for hearing on 17/12/2020 at 9.00 am but the defendant and her Counsel were not present as at 9.25 am when the suit was heard.

    c. The primary considerations are whether there is a defence with a real prospect of success, and that justice should be done. The trail magistrate erred in not considering the Defence. The court did not make any reference to the defence as a result of which she ended up exercising her discretion in error.

    d. Prejudice (or the absence of it) to the claimant also has to be taken into account.

34. Had the trial court addressed itself to the defence, it would have referred to the fact that the Appellant denied the contents of paragraph 4 of the Plaint together with the particulars of negligence as set out in the same paragraph and shall put the Plaintiff to strict proof thereof.

35. The Appellant also pleaded in the alternative and without prejudice to the above stating that if the deceased was fatally injured as alleged such injury was caused by the negligence on their part.

    Particulars of Negligence of the Deceased

    a. Recklessly riding motor cycle registration KMDA 955F.

    b. Failing to put on a reflector jacket and helmet.

    c. Failing to take care of his own safety.

    d. Failing to adhere to the provisions of the *Traffic Act* Cap 403, Laws of Kenya.

36. The Appellant further pleaded that he denies the contents of paragraphs 5 and 6 of the Plaint and shall put Plaintiff/Respondent to strict proof thereof.

37. The Appellant then pleaded that the Plaintiff/Respondent has no knowledge of any special damages as particularized and demanded by the Plaintiff in paragraphs 7 of the Plaint and shall put the plaintiff to strict proof thereof.

38. Had the magistrate considered the Defence, then she would have returned a finding that the same raises triable issues. She fell into error while exercising her discretion in the circumstances.

39. The trial court also did not address its mind to this critical principle of prejudice. The upshot is that the discretion was not exercised judiciously.

40. In the case of *Rahman vs Rahman* (1999) LTL 26/11/9), the court considered the nature of the discretion to set aside a default judgment and concluded that the elements the judge had to consider were: the nature of the defence, the period of delay (i.e., why the application to set aside had not been made before), any prejudice the claimant was likely to suffer if the default judgment was set aside, and the overriding objective.

41. This court must give the Appellant reprieve by granting him a chance to be heard more so considering the fact that the suit involves a fatal accident claim so as to promote the right to be heard as guaranteed under Article 50 of *The Constitution*.

Orders:

1. This appeal succeeds.
2. The ruling delivered on 25th May 2021 is hereby set aside.
3. The application dated 29th January 2020 is hereby allowed conditionally.
4. The Applicant shall pay the sum of Kshs.10,000 as throw away costs.
5. The case shall be placed before a different trial magistrate for hearing within sixty days of today's date.
6. Costs to the Appellant.

DATED, SIGNED AND DELIVERED AT KIAMBU THIS 6TH DAY OF MARCH, 2023.

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J. CHIGITI (SC)

JUDGE