



REPUBLIC OF KENYA



KENYA LAW
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**Kibirie v Onialo & 2 others (Civil Appeal 707 of 2019)
[2023] KEHC 3072 (KLR) (Civ) (14 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 707 OF 2019

AN ONGERI, J

APRIL 14, 2023

BETWEEN

HARUN NGANGA KIBIRIE APPELLANT

AND

ZERA ANYANGO ONIALO 1ST RESPONDENT

CHRISTOPHER OMUSALA 2ND RESPONDENT

JASON MAROKO 3RD RESPONDENT

*(Being an appeal from the ruling of Hon. D. O. Mbeja (SRM)
in Milimani CMCC No. 6125 of 2014 delivered on 15/11/2019)*

JUDGMENT

1. The applicant Harun Nganga Kibirie was sued by the Respondents in Milimani CMCC no. 6125 of 2014.
2. The Appellant was served with the summons to enter appearance and file a defence and the Appellant's advocate entered appearance but inadvertently failed to file a defence.
3. The trial court entered interlocutory judgment on 2/2/2018 and the Appellant's application dated 12/7/2019 seeking to set aside the interlocutory judgment was dismissed on 15/11/2019 hence this appeal.
4. The Appellant in his memorandum of appeal has stated in summary as follows:
 1. The learned magistrate erred in law and in fact by failing to take into consideration the grounds cited in the notice of motion dated 12th July 2019, the depositions made in the supporting affidavit and the appellants written submissions in dismissing the said motion.



2. The learned trial magistrate erred in law and in fact by not taking into account the appellants defence filed in the suit in reaching his decision to dismiss the appellants application.
 3. The learned trial magistrate erred in law and in fact by not applying the relevant principles of law applicable when exercising judicial discretion on applications for setting aside ex parte judgements.
 4. That the learned magistrate erred in law and in fact in failing to appreciate that they never had any intention to have the matter proceed ex parte and thus allowing defence cross examine the plaintiff would have enable the court reach a just and fair determination of the suit.
 5. The learned magistrate erred in law and in fact in failing to appreciate that the appellant has a right to fair hearing which includes defending his case.
5. The appellants in his submission indicated that what is before this court is a default judgement. He admitted that he was served with summons and his former advocate entered appearance but inadvertently failed to file defence as the advocate who was handling the matter left the firm without a proper handing over.
 6. The appellant argued that the mistake of his former advocates should not be visited on him and prayed for this court to set aside the ex parte judgement and allow him to defend the suit on merit to its logical conclusion.
 7. In support he cited *Belinda Muras & 6 others v. Amos Wainaina* [1978] KLR where it was held;

“A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel 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 of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate.”
 8. The appellant submitted that his intention is not to delay or obstruct the cause of justice. He indicated that there was no delay in filing the application to set aside the ex parte judgement and that his defence raises triable issues.
 9. The 1st respondent in her submissions indicated that the appellant was given notice that judgement had been entered against him. The case was thereafter set down for assessment of damages on October 2, 2018. The appellants were served with a hearing notice dated September 13, 2018 and was received by his advocates then on record.
 10. The 1st respondent contended that the appellant was only jolted into action upon service of a decree and sought to blame an advocate who is alleged to have left employment. She added that the appellant is deliberately trying to derail justice by his inaction.
 11. The issues for determination in this appeal are as follows
 - i. Whether the trial court considered the grounds upon which the application dated 12/7/2019 was based on.
 - ii. Whether the Appellant had a valid defence with triable issues.
 - iii. Whether failure to comply with Mandatory Statutory procedures can be regarded as a procedural technicality.



- iv. Whether the interlocutory judgment ought to be set aside.
12. On the issue as to whether the trial court considered the grounds upon which the application dated 12/7/2019 was based, I have perused the impugned ruling and I find that the trial court found that the supporting affidavit of the application was not dated and made a finding that the said affidavit was filed contrary to mandatory provisions of section 5 of the *Oaths and Statutory Declaration Act* and the same was accordingly struck off.
 13. The trial court accordingly dismissed the application dated 12/7/2019 on the ground that the same was not buttressed.
 14. The trial court relied on the case of *Raila Odinga vs Iebc & others* (2013) eKLR where the court held that article 159(2) (d) of *the Constitution* simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice.
 15. The court also held in the *Raila Odinga* Case (supra) that article 159(2) (d) was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court.
 16. I find that the trial court had the option of granting the Appellant an opportunity to file a complaint supporting affidavit.
 17. I find that the application dated 12/7/2019 was dismissed on a technicality and the same was not heard and determined on its own merits.
 18. The trial court ought to have considered the ground upon which the said application was based such as the reason for failure to file a defence and whether the appellant had a valid defence which raised triable issues.
 19. I find that even failure to comply with a mandatory statutory requirement can amount to a procedural technicality.
 20. The court should rise to courts higher calling to do justice between the parties.
 21. I find that the reason for failure to file a defence was the mistake of the advocate who entered appearance and failed to file a defence.
 22. I find that it is not in the interest of justice to punish a litigant for the mistake or omission of his advocate.
 23. I find that the laws of natural justice demand that parties be heard on merit and that substantive justice ought not to be sacrificed at the alter of procedural technicalities.
 24. I rely on the case of *Mbogo & Another vs Shab* (1968) EA 98 where the court held as follows:

“I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
 25. In the current case, the Trial court failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.
 26. I find that there is no prejudice which can be suffered by the Respondent which cannot be compensated by an award of damages.



- 27. I allow the appeal and I set aside the exparte judgment and its consequential orders and I direct that the case be heard denovo before any other court other than the one that dismissed the Appellant’s application.
- 28. The Appellant to pay the Respondents thrown away costs assessed at ksh.20,000/= before the suit is set down for hearing.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

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A. ONGERI
JUDGE

In the presence of:

- for the Appellant
- for the 1st Respondent
- for the 2nd Respondent
- for the 3rd Respondent

