



REPUBLIC OF KENYA



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**Simbisa Brands Kenya Limited v Spero Africa Limited & another (Civil Appeal
484 of 2019) [2023] KEHC 18525 (KLR) (Civ) (16 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18525 (KLR)

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

CIVIL

CIVIL APPEAL 484 OF 2019

JN NJAGI, J

MAY 16, 2023

BETWEEN

SIMBISA BRANDS KENYA LIMITED APPELLANT

AND

SPERO AFRICA LIMITED 1ST RESPONDENT

BENSON MWANGI KARIUKI 2ND RESPONDENT

*(Being an appeal from the ruling of Hon.M.W.Murage, Senior Resident Magistrate,
in Nairobi CM's Court Civil Suit No.9692 of 2018 delivered on 22/7/2019)*

JUDGMENT

1. The Appellant herein had filed an application before the lower court dated 4th April 2019 seeking to set aside a default judgment that had been entered against it in an accident claim after it failed to enter appearance and file a defence within the required time. The Appellant was also in the application seeking for leave of the court to defend the suit.
2. Subsequently, the Appellant filed an application dated 4th May 2019 seeking for stay of execution pending the hearing and determination of the application dated 4th April 2019. However, that the Respondent instructed a firm of auctioneers to levy execution and he was forced to pay the decretal amount under duress.
3. The explanation offered by the Appellant for not entering appearance or filing a defence was that they had upon service forwarded the documents to their insurance company who failed to act timeously. In their draft defence annexed to their application they denied the particulars of negligence averred by the Respondent herein and contended that the Respondent's driver was the one who was negligent.



4. The trial magistrate dismissed the two applications on the grounds that the Appellant admitted to have been served with summons and pleadings and that the explanation given for not entering appearance was not satisfactory as the insurance company was not a party to the suit. The Magistrate further held that the draft defence filed by the Appellant did not raise any triable issue. That there was nothing to stay as execution had already taken place. The Appellant was dissatisfied with the ruling and filed the instant appeal.
5. The grounds of appeal are that:
 1. The learned Magistrate erred in fact and in law in finding that the Appellant's defence disclosed no triable issues
 2. The learned Magistrate erred in fact and in law in failing to appreciate that the decretal amount had been paid to the first Respondent's Advocate under threat of execution as no stay had been granted and therefore no settlement had been made.
 3. The Learned Magistrate erred in fact and in law in ignoring the Appellant's authorities in support of the application to set aside the default judgment.
 4. The learned Magistrate erred in law and in fact in failing to follow precedent as laid out in the authorities relied on by the Appellant.
 5. The learned Magistrate erred in law and in fact in not pronouncing herself with clarity in respect of the Appellant's two applications on record.
 6. The learned Magistrate erred in fact and in law in failing to exercise her discretion judiciously thereby effectively condemning the Appellant unheard.
6. The appeal was canvassed by way of written submissions. The Appellant through the firm of A.H. Malik Malik & Co Advocates submitted that the Appellant in his draft defence had denied negligence on his part and attributed it on the driver of the Respondent. That it was clear that the draft defence raised a triable issue.
7. The Appellant submitted that they had no option than to pay when execution was levied. He faulted the trial Magistrate for failing to appreciate that the decretal sum was paid under duress and threat of execution and not as an admission of liability.
8. The Appellant faulted the trial Magistrate for ignoring its submissions and authorities they had cited in support of the application. He submitted that the trial court arrived at its decision without full consideration of settled law in setting aside default judgment.
9. The Appellant submitted that the trial Magistrate failed to exercise her discretion judiciously by directing her mind on the relevant facts and the correct application of legal principles in its decision. That as a result she denied the Appellant its day in court thereby depriving it of its constitutional right to be heard. The Appellant urged the court to allow the appeal.
10. The 2nd Respondent through the firm of Magare Masundi & Co Advocates, on the other hand submitted that Order 10 Rule 4(1) gives power to the court to enter judgment against the defendant where the defendant fails to appear. That courts have unfettered jurisdiction to set aside ex parte judgments. That the things to be considered in doing so are as was stated in the case of *Mohamed & another v Shoka* [1990] KLR.
11. It was submitted that the judgment entered against the Appellant was regular as pleadings and summons to enter appearance were served and acknowledged by the Appellant. That in the case of



Tree Shade Motors Ltd v D.T. Dobie Co. Ltd CA 38 of 1998 it was observed that where a court holds that an ex parte judgment was regular, the court should look at the draft defence to see if it contained a valid reasonable defence. That in this case the trial court was right in holding that the draft defence lacked triable issues.

12. On the complaint that the Appellant paid the decretal sum under duress, the 1st Respondent submitted that he followed due process as provided by the law. It was submitted that there is nothing to set aside as the decretal sum has already been settled by the Appellant. That the appeal is without merit and should be dismissed with costs.
13. I have considered the grounds in support of appeal, the grounds in opposition thereto and the submissions of the respective advocates for the parties. The issues for determination are:
 - (1) Whether there was a satisfactory reason for not entering appearance.
 - (2) whether the draft defence raised triable issues.
14. The court has unfettered power under Order 10 Rule 11(4) of the *Civil Procedure Rules, 2010* to set aside a default judgment. The Order provides that:

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”
15. In the case of *Mohamed & another v Shoka* (*supra*) the Court set out the tenets a court should consider in setting aside interlocutory judgment to include:
 - i) Whether there is a regular judgment;
 - ii) Whether there is a defence on merit;
 - iii) Whether there is a reasonable explanation for any delay;
 - iv) Whether there would be any prejudice.
16. The court is in the first place required to interrogate whether the impugned judgment is a regular one or an irregular one. A distinction has to be made between the two as observed in the case of *Fidelity Commercial Bank Ltd v Owen Amos Ndungu & another*, HCC No.241 of 1998 (UR) as cited in *Southern Credit Banking Corporation Limited v Jonah Stephen Ng'ang'a* [2006] eKLR, where the court stated as follows:

“A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the ex parte judgment entered in default is regular. But where ex parte judgment sought to be set aside is obtained either because there was no proper service or any service at all the summons to enter appearance, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right”
17. In the instant case the summons were served upon the Appellant and therefore the default judgment was a regular one. The question then was whether the Appellant had adduced sufficient grounds to warrant the judgment being set aside.
18. The explanation offered by the Appellant for not entering appearance or filing a defence was that he had forwarded the documents to his insurance company who did not take action. The trial magistrate was not satisfied with this explanation on the reasoning that the Appellant did not make a follow up



with the insurance company and that the insurance company was not a party to the suit. I agree with the reasoning of the trial court that the Appellant should have followed up with the insurance company so as to know whether they were to take up the matter or not. They seem to have been satisfied with just forwarding the documents to their insurance company and took no further action after that. They have only themselves to blame for their indolence. The default judgment was in the circumstances a regular one and was lawfully entered for non-appearance.

19. The fact that that a lawful judgment as been entered is no bar to setting aside a default judgment. The court is required to interrogate whether a defence filed raises any triable issue. In the case of *Tree Shade Motor Limited v DT Dobie Co Ltd* CA 38/98, the Court held that even when ex-parte judgment was lawfully entered, the court should look at the draft defence to see if it contains a valid or reasonable defence. In the case of *Sebei District Administration v Gasyali & others* [1968] EA 300 Sheridan J remarked that:

“The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court”

20. In deciding whether the defence raises any triable issue, the court is to bear in mind that a triable issue is not one that must succeed but one that requires further interrogation of the court. A triable issue was defined by the Court of Appeal in the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR as follows:

“A *bona fide* triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.”

21. In this case the trial magistrate said that the draft defence of the Appellant did not raise any triable issue. She however did not give any reason as to why she was of the view that the draft defence did not raise any triable issue.

22. I have considered the draft defence as against the averments in the plaint. The Respondent in his plaint blamed the Appellant's driver for causing the accident. The Appellant on the other hand in his plaint blamed the Respondent's driver for causing the accident. These are two opposing averments as to who caused the accident. At that stage it could not be known as to which party was telling the truth. This had to be interrogated through adduction of evidence. It is therefore my considered view that the draft defence raised a triable issue as to which party was to blame for causing the accident. The learned magistrate was wrong in holding that the draft defence did not raise any triable issue.

23. In view of the foregoing, there is reason to interfere with the decision of the lower court in this matter. The court makes the following orders:

1. The appeal is hereby allowed and the default judgment is accordingly set aside.
2. The Appellant is granted leave to file a defence out of time.
3. The matter is remitted to the Magistrate's court for hearing and determination on merit.
4. The Appellant to have the costs of the appeal.



Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF MAY 2023.

J N NJAGI

JUDGE

In the presence of:

Ms Kemunto for Appellant

Ms Kavita for Respondent

Court Clerk – Amina

30 days Right of Appeal

