Rehema Academy & Computer School v Mbugua & 2 others (Civil Appeal 133 of 2019) [2023] KEHC 19369 (KLR) (Civ) (23 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19369 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 133 OF 2019

AA VISRAM, J

JUNE 23, 2023

BETWEEN

REHEMA ACADEMY & COMPUTER SCHOOL ..... APPELLANT

AND

EUNICE WANJIRU MBUGUA ..... 1ST RESPONDENT

KENYA BUS SERVICE MANAGEMENT LTD ..... 2ND RESPONDENT

PAUL NYANDUMO ONTEERE ..... 3RD RESPONDENT

(Being an appeal from the entire Ruling/decision and order of the Chief Magistrate's Court at Milimani Law Courts, Nairobi issued on the 26/02/2019 by the Honorable Magistrate Ofisi, MS in Nairobi CMCC No. 7481 of 2015)

JUDGMENT

Introduction

1. This is an appeal from the ruling of the trial court delivered on February 26, 2019, in respect of the application dated November 5, 2018 ("the Application"). The Appellant (1st Defendant in the lower court) had sought the following orders:- that the lower court set aside its *ex-parte* interlocutory judgment; leave to file its Defence out of time; proceedings commence afresh; and that the same orders apply to CMCC No 7482/2015, CMCC No 7483/2015, CMCC No 7484/2015 & CMCC No 7485/2015.

2. The lower court found the Application was without merit, and dismissed the same.

3. Aggrieved by the above ruling, the Appellant preferred this appeal on the following grounds set out in its Memorandum of Appeal dated March 7, 2019:-

    a. That the Learned Trial Magistrate erred in law and in fact in dismissing the Appellant's application dated November 5, 2018.

    b. That the Trial Magistrate erred in law and in fact in arriving at a finding that the Appellant's application had no merit.

    c. That the Learned Magistrate erred in law and in fact in not considering the circumstances and nature of the application before him.

    d. That the Learned Magistrate erred in law and in fact in arriving at a finding that the Appellant had not satisfied the grounds upon which an interlocutory judgment could be set aside.

    e. That the Learned Magistrate erred in law and in fact in arriving at finding that the Appellant had not satisfied the grounds upon which an interlocutory judgment could be set aside.

    f. That the Learned Magistrate erred in law and in fact in arriving at a finding that the Appellant's statement of Defence attached to the application dated November 5, 2018 did not raise triable issues.

    g. That the Learned Magistrate erred in law and in fact in making a finding that the 1st respondent was entitled to enjoy the fruits of her judgment when in actual sense, there was no final judgment in the matter.

4. The parties agreed that the matter be disposed of by way of written submissions, and the Appellant and 1st respondent filed their respective submissions on January 30, 2023, and January 31, 2023.

Appellant's Submissions

5. The Appellant submitted that it did not know how or when the case had progressed. It had transmitted the pleadings to its insurance company, which in turn, instructed the firm of Anya Kalwa & Company Advocates to defend its case. This was not done.

6. Once the Appellant realized what had happened, it hired the firm of Onindo Onindo & Associates to defend its case.

7. The Appellant submitted that because this is a test case, it would stand to suffer in all the other related matters.

8. The Appellant relied on the decision of the High Court in *David Kiptanui Yego & Others v Benjamin Rono & Others* [2021] eKLR, in support of its submission that a mistake of the advocate should not be meted out on the client. It further relied on the decision of the High Court in *Kenya Commercial Bank Ltd v Nyantange & Another* 1990 KLR 443, where the court held that:-

> "Order IXA rule 10 of the *Civil Procedure Rules* donates a discretionary power to the court to set aside or vary an ex-parte judgment entered in default of appearance or Defence and any consequential decree or order upon such terms as are just."

9. The Appellant Submitted that it had raised triable issues in its Defence and relied on the decision of the High Court in *Rayat Trading Co Limited v Bank of Baroda & Tetezi House Ltd* (2018) eKLR, where the court stated that one of the key factors to consider when setting aside an *ex-parte* judgment is whether the Defendant has a Defence on merit.

10. In support of the above Submissions, the Appellant relied on the decision of the High Court in *Sebei District Administration V Gasyali & others* (1968) EA 300, where the court observed:-

> " 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"

The 1st Respondent's Submissions

11. The 1st Respondent submitted that it would be prejudicial not only for her, but for all the Plaintiffs in the test related cases, if the appeal herein were to succeed.

12. She submitted that the Appellant was laying the blame on the firm of Anya Kalwa & Company Advocates for failing to file a Defence on behalf of the Appellant, but that it was the Appellant's duty, as the litigant, to follow up its case, and ensure that its advocates on record had filed the necessary documents. It could not pass the blame to its advocates at the expense of the Respondents and other Plaintiffs involved in the test cases.

13. In support of the above submission, the 1st Respondent cited the High Court authority in Savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No 397 of 2002(cited in the attached case of *International Air Transport Association & Another v Roskar Travel Limited & 3 Others* (Civil Case E457 of 2020) , where Kimaru, J (as he then was) expressed himself in the following terms:-

> " Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates, failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case."

14. Moreover, that the question of 'who is to blame', was an issue between the Appellant and its insurers, not the Respondents, who ought not to be affected by their mistakes.

15. The 1st Respondent submitted that the Appellant had delayed in making the Application, and the same ought not be allowed on appeal because "equity aids the vigilant, and not the indolent". She urged this court to conclude that the Trial Magistrate was justified in refusing to vacate the default judgment because the Appellant had taken too long to file the Application and the Defence.

16. In support of the above Submission, the 1st Respondent relied on the decision of the High Court in *International Air Transport Association & another v Roskar Travel Limited & 3 Others* (Civil Case E457 of 2020) (2022) eKLR, where Okwany, J. stated that:-

> " It is not enough for a party to simply blame an advocate for a mistake but the party must show tangible steps taken by him in following up his matter. It is evident from the court record that the application to set aside the interlocutory judgment was brought 5 months after judgment had been given which is in my view an inordinate delay."

17. Finally, the 1st Respondent submitted that the draft Defence did not raise any new issues that had not already been answered. Accordingly, the Appellant had not met the conditions to justify setting aside the *ex-parte* judgment.

Analysis and Determination

18. This being a first appeal, the court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see *Selle v Associated Motor Boat Co* [1968] EA 123). In *Kiruga v Kiruga & Another* [1988] KLR 348, where the Court of Appeal stated the following:-

> " 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 conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally."

19. I have considered the grounds set out in the Memorandum of Appeal and the rival submission of the parties as stated above. The issue for determination is whether or not the lower court ought to have granted the various orders sought in the Application (as particularized above), namely, to set aside the *ex-parte* judgment of the lower court and its consequential effects.

20. Order 10 Rule 4 (1) and (2) of the *Civil Procedure Rules* is instructive. It stipulates as follows:-

> 4(1) Where the plaint makes a liquidated demand only and the Defendant fails to appear on or before the day fixed in the summons or all the Defendants fail so to appear, the court shall, on request in Form No 13 of Appendix A, enter judgment against the Defendant or Defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.
>
> (2) Where the plaint makes a liquidated demand together with some other claim, and the Defendant fails, or all the Defendants fail to appear as aforesaid, the Court shall, on request in Form No 13 of Appendix A, enter judgment for the

liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

21. Order 10 rule 11 of the *Civil Procedure Rules* on the other hand provides that *ex-parte* interlocutory judgment in default of appearance or Defence may be set aside; it states as follows:-

> "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."

22. I note that the seminal authority in respect of this area of law is *Mbogo & Another vs Shah* (1968) 1 EA 93, where the Court stated;

> "Applying the principle that the Court's discretion to set aside an ex-parte judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused."

23. The principle that emerges from the above cited cases is that the discretion of a court to set aside or vary ex-parte judgment entered in default of appearance or Defence is a free one, intended to be exercised to avoid injustice or hardship, but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. (emphasis mine)

24. In the present case, it is not disputed that the Appellant was duly served with the Plaint and Summons to enter appearance on February 1, 2016. The Appellant duly entered appearance through the firm of Anya Kalwa & Company Advocates but failed to file its Defence within the stipulated period, thereby precipitating the 1st Respondent's request for judgment in default, which was duly entered on July 5, 2016.

25. Based on the chronology of the events as set out above, it is evident that the Appellant filed the Application two entire years after the judgment in default. I am of the view that the said period of delay was inordinate. Further, I do not think that the Appellant has satisfactorily explained the reasons for its said delay. In particular, beyond blaming its advocates on record and the insurance company, it has not shown sufficient evidence (based on the record) to demonstrate the particular steps and efforts it undertook to remedy its error during the period of delay.

26. Applying my mind to the decisions of the High Court as set out in *International Air Transport Association & another (supra) and Savings and Loans Limited* (*supra*), the case belongs to the litigant and not its advocates, or any other party. The litigant has a duty to prosecute its case, and if it is unable to, it must demonstrate why it was unable to do, and show the court what steps and efforts it made to follow up on its case to the best of its ability. I am not satisfied that the Appellant has shown this.

27. Based on the principles set out in *Mbogo & Another vs Shah* (*supra*), I am satisfied that the delay in the present matter will obstruct the course of justice and will prejudice not only the Respondent, but also, all the Plaintiffs, who have been waiting for this test case to be resolved for over eight years to date, and from the time the suit was commenced.

28. I am also of the view that the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access the court and be heard in Defence. In balancing these rights, the courts must have regard to the timelines provided in the *Civil Procedure Rules*. I do not think a party may ignore timelines in one breath and with the other, claim that his rights have been denied. Especially, where the period of delay has been inordinate and no good reasons have been offered to justify the same.

29. Based on the reasons as set out above, I find that the appeal is without merit and the same is dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 23RD DAY OF JUNE 2023

ALEEM VISRAM

JUDGE

In the presence of;

.....For the Appellant

.....For the Respondent