



Said v Kenya Auto Spares Agencies Limited & another (Civil Appeal E043 of 2021) [2023] KEHC 22209 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KEHC 22209 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E043 OF 2021**

F WANGARI, J

JULY 7, 2023

BETWEEN

KHALFAN SAID APPELLANT

AND

KENYA AUTO SPARES AGENCIES LIMITED 1ST RESPONDENT

SHEIKH ALI TAIB 2ND RESPONDENT

(Being an Appeal against the Ruling of the Hon. C. Ndegwa Senior Principal Magistrate delivered on 15th March 2021 in Mombasa RMCC No. 171 of 2001)

JUDGMENT

1. This is an appeal against the ruling delivered by Hon. C. Ndegwa SPM. The Appellant being dissatisfied with the said ruling preferred this appeal. The Appellant preferred 4 grounds of appeal in urging this court to set aside the ruling of the lower court among them, that the trial court failed to set aside the judgment on ground that there was a delay in filing the application seeking for the said orders.
2. Directions were taken that the appeal be disposed off by way of written submissions, where all parties duly complied and relied on various decisions in support of their rival positions. I have duly considered the said submissions together with the various cited authorities.
3. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & another v Associated Motor Boat Co. Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the Trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & another* (1988) KLR 348).



4. I have carefully perused and understood the contents of the pleadings, proceedings, judgement, decree, grounds of appeal, submissions and the decisions referred to by the parties. To be able to ascertain whether the judgement ought to stand or otherwise, I will carefully revisit the record.

Analysis and Determination

5. I have considered the application, response, submissions together with the authorities relied upon by the parties as well as the law and in my respectful view, there is only one issue for determination which is whether the trial court erred in law in disallowing the application dated 7/8/2020. Corollary to this finding is the issue of costs.
6. In the application, the Applicant (now Appellant) sought to have a temporary stay of execution of the judgment and decree issued on 26/7/2013, and that the said judgment be set aside and case re opened for defence hearing. In his Ruling delivered on 15/3/2021, Hon. Ndegwa declined to grant the orders, and the said ruling is subject of this appeal.
7. The principles involved in setting aside *ex parte* judgment are set out in the case of *Patel v East Africa Cargo Handling Services Limited* (1974) EA 75, where the court held as follows;

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”
8. The *ex parte* judgment in the lower court was delivered on 26/7/2013. The Appellant made the application to set aside the said judgment and he be allowed to defend the suit via a Notice of Motion dated 7/8/2020, seven (7) years after the delivery of judgment. He also amended the application and sought for leave to appeal out of time. In relying on the case of *Shah v Mbogo* (1967) E.A 116, the Honourable Magistrate declined to exercise the discretion of the court in setting aside of the *ex parte* judgment and leave to appeal out of time on grounds that it would result to an injustice, obstruction and delaying the course of justice, as the Appellant ‘went to sleep for over 6 years and has woken up to reality when the Notice to Show Cause was issued against him’.
9. The Appellant blamed his advocate for the failure to defend the suit in the lower court and only came to know of the status of the matter when the Notice to Show Cause was issued against him. It has been held that as much as the mistake of an advocate should not be visited upon the client, the litigant also has a duty in following up on the progress of his case. In *Savings & Loan Ltd v Susan Wanjiru Muritu* Nairobi Milimani HCC 397/02, it was held as follows;

“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.”
10. Having considered the above, I find that the court correctly applied the principles in setting aside *ex parte* judgment, while declining to grant the orders as sought for by the Appellant.



11. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. The Respondents having been dragged into these proceeding over 7 years after the lower court judgment was passed, I find it only fair to award costs.
12. Following the foregone discourse, the upshot is that the following orders do hereby issue;
 - a. The application dated 7th August, 2020 lacks merit and thus hereby dismissed.
 - b. Costs to the Respondents.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY, 2023.

.....

F. WANGARI

JUDGE

In the presence of;

Omondi Advocate h/b for Khatib Advocate for the Appellant

N/A for the Respondent

Barile, Court Assistant

