Sunrise Resort Apartments & Spa Limited v Eco Bank Kenya Limited (Civil Suit 135 of 2014) [2023] KEHC 23129 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23129 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 135 OF 2014

DKN MAGARE, J

SEPTEMBER 20, 2023

BETWEEN

SUNRISE RESORT APARTMENTS & SPA LIMITED ..... PLAINTIFF

AND

ECO BANK KENYA LIMITED ..... DEFENDANT

(HCCC NO. 135 OF 2014)

RULING

1. In one of the shortest rulings I have seen from Justice PJO Otieno, he gave the following orders in this case on 4/4/2019 as reported in *Sunrise Resort Apartments & Spa Limited v Eco Bank Kenya Limited* [2019] eKLR: -

> " Parties are unable to agree on a mutual auditor to reconcile the two audit report presented to court by each side hence as directed by court on 24/01/2019, the court now appoints:
>
> Ms. Lobonyo & Associates
>
> 1st Floor, Super Contractors Building, Sotik Road
>
> Off Bunyala Road
>
> Box 62776 – 00200
>
> Tel: 0711-956305, 0700883723
>
> NAIROBI:
>
> 'To reconcile the two reports presented to court and compile own report within 30 days from the date this order and the two reports shall have been served upon them.'

2. The audit fees to be agreed with the auditor will be borne equally between the parties and be paid within 7 days from the date the auditor shall have filed his report in court.

3. Mention on 13/5/2019 to confirm the progress made."

2. The report was filed. However, an application was made on 25/10/2019. The said application was argued inter partes. In its final decision the court gave the following orders: -

"That

a. To the extent that he went beyond the boundaries, he {Ms. Lobonyo & Associates} failed the court in the purpose for what he was appointed. For departure I hold the view that the appointment having not met the purpose, calls for being reversed and set aside. I so set aside the order of 4/4/2019 aside with the consequence that the audit report dated(*sic*) filed in court on the 01/10/2019 is not a reconciliation report intended by the court.

b. This file has provided me with a lesion that many times, parties come to court with no clear desire to have the dispute resolved but merely to put the matter in court and sustain a deadlock even where same can be avoided. For that reason and in order that this matter be brought to a conclusion before this court, I direct that parties shall call each of the auditors who prepared the two reports by IRAC as sell as PFK to attend court to produce their reports... this can however be avoided if Mr Kamau for the defendant maintains his position that he told(sic) to the court by his oral submissions that he is prepared to adopt the report by IRAC."

3. This ruling was made on 6/3/2020. For 3 years parties have been dancing. Around this ruling. The matter came before me on the date it was listed for hearing. I was satisfied that service and requested the Plaintiff to put his witness on the dock. He then proceeded to call M/s. Lobonyo & Associates to testify and produce the report that was expunged. To my horror, I noted the Plaintiff calmly closing their case. I did not ask any questions. It is my duty to communicate in writing.

4. When the judgment was ready, and the quotation in the cases above featuring prominently, the gods sent angels to rescue the Plaintiff from their own ignominy. By an application dated 11/5/2023 the Defendant sought to breathe life into the case. Who can begrudge them. The order of the court that had not been set aside was succinct.

5. The same was opposed through an affidavit of Benjamin Amadi. He stated that the date of 2/5/2023 was taken by consent. A perusal of the court file, shows that it is not the position.

6. Submissions were not filed and as such parties relied on their affidavits.

Analysis

7. There are two aspects of setting aside. The first part is where the proceedings are highly irregular. The second part is where no service was done and as such the proceedings are irregular. In the case of the latter, the party is entitled to setting aside as of right.

8. In the case of *Joswa Kenyatta v Civicon Limited* [2020] eKLR the court, Justice Onesmus Makau held as doth:

> " 21. However, before the court can set aside its ex-parte decision or proceedings, it is trite law that it must consider whether the applicant has any defence which raises triable issues. In *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75 Duffus P. held that:
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> > " "The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."
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> 22. Again in the case of *CMC Holdings Limited v James Mumo Nzioki* [2004] eKLR, the Court stated:
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> > " "The law is now well settled that in an application for setting aside *ex parte* judgment, the court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for 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 a draft defence is annexed to the application, raises triable issues."

9. In the first limb, there must be sufficient reason for non-attendance. If a party was not properly served, then the court ought to allow the party to Defend. In the case of *PMM v JNW* [2020] eKLR, the court L. A. Achode, as then she was, stated as doth: -

> " 31. It is therefore evident that the Applicant, through his Advocates on record, made an effort to file his replying affidavit before the hearing date and to be present at the virtual hearing of 4th June, 2020. In the circumstances thereof, it would be unjust and a miscarriage of justice to deny the Applicant a chance to advance his case when as demonstrated, he has expressed a desire to be heard on the application dated 30th January, 2020. The right to be heard is a well-protected right in our Constitution and is also the cornerstone of the rule of law. This right should therefore not be taken away by the strike of a pen, where sufficient cause has been shown. (See - *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* Civil Appeal No 18 of 2013 [2013] eKLR).
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> 32. In the circumstances of this case, the Applicant is not wholly to blame for the delay in filing his replying affidavit dated 30th June, 2020 or his failure to attend the virtual hearing of 4th June, 2020 having given sufficient explanation thereof. The court must not oust the Applicant from being heard for no absolute fault

of its own. This is especially so, in a case such as this where the subject matter concerns a child. The court is under a duty to make orders that will advance the best interest of the child which is paramount. To do so, it is important that the court appraises the arguments advanced by the respective parties on both sides in order to weed out mischief and malice, if there so be, on either party's part, and determine the application on merit."

10. Lastly, the plaintiff proceeded in contempt of a court order. It is the duty of counsel not to mislead the court. Their clients are likely to suffer if they attempt to steal a match on their colleagues and the court. They should therefore thank the Defendants for giving them a golden olive branch to breathe life to their case. The court has specifically ordered that IRAC report and PFK report be relied on. These were not on record as at the time I was writing the judgment.

11. The date was taken and there was no service. The court was misled that the Defendant was served. There were not. They are thus entitled to setting aside as of right.

12. I don't want to go to the merit of the case. Someone has been given a second bite of the cherry. Kindly bite. In the case of *Kwanza Estates Limited v Dubai Bank Kenya Limited (In Liquidation) & 2 others* [2019] eKLR, the court of appeal stated as doth: -

> " 25. The position taken by the Judge is consistent with the decision of this Court in the case of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR on which the Judge relied to the effect that once it comes to the notice of the court that a judgment is irregular, the court does not have to be moved to set it aside. It can do so suo motto without venturing into considerations whether the intended defence raises triable issues or whether there was delay in applying to set aside the irregular judgment."

13. In the case of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR, the Court of Appeal, Makhandia, Ouko & M'inoti, JJA), stated as doth: -

> " The former Court of Appeal for Eastern Africa, in *Ali Bin Khamis v Salim Bin Khamis Kirobe & others*, [1956] 1 EA 195 expressed the view that where an order is made without service upon a person who is affected by it, procedural cockups will not deter the court, ex debito justitiae, from setting aside such an order. Briggs, JA, with whom Worley P. and Sinclair, VP. concurred, stated thus:
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> > " "On the appeal before us Mr. Khanna relied on *Craig v Kanseen* [1943] 1 All ER 108 as showing that where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before its can be made, the order is a nullity in the sense that it must be set aside *ex debito justitiae*, and that in cases of nullity procedure is unimportant, since the Court has inherent jurisdiction to set aside its own order. I accept these principles, as laid down by Lord Greene, MR." (Emphasis added).

14. There were procedural lapses making the proceedings untenable. In the circumstances, I find the application dated 11/5/2023 merited and I allow it. Costs follow the event. The Defendants were the angels the Plaintiff needed. It cannot be hard assuaging them with costs.

Determination

15. I make the following orders: -

    a. The application dated 11/5/2023, is allowed with costs of 30,000/= payable to the Defendant payable within 30 days.

    b. The suit shall stand dismissed with costs if the said costs are not paid by 19/10/2023

    c. For avoidance of doubt, the exparte proceedings are hereby set aside. The report by Ms. Lobonyo & Associates stands expunged from the record.

    d. Parties to avail the two reports or IRAC report if by consent on the next hearing, which shall be fixed immediately after this ruling.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF SEPTEMBER, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mr Amadi for the Plaintiff

Ms Vanessa Njehia for the defendant

Court Assistant - Brian