Afrodane Industries Limited v Migosi (Civil Appeal E473 of 2023)
[2024] KEHC 14139 (KLR) (Civ) (7 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14139 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E473 OF 2023

MA OTIENO, J

NOVEMBER 7, 2024

BETWEEN

AFRODANE INDUSTRIES LIMITED ..... APPELLANT

AND

SAMUEL OMBARE MIGOSI ..... RESPONDENT

(An appeal from the Ruling and Order of Honourable H.M. Ng'an'ga (PM) delivered on 6th June 2023 in the Milimani CMCC No. 4760 of 2023)

JUDGMENT

Introduction

1. This is an Appeal from the magistrate court's Ruling delivered on 6th June 2023 in the Milimani CMCC No. 4760 of 2023 where the trial court dismissed the Appellant's Notice of Motion Application dated 25th November 2022 in which the Appellant sought the setting aside the court's ex-parte judgment of 19th January 2022 against the 3rd Defendant.

2. The background of the matter is that by a plaint dated 30th April 2013, the Respondent instituted a suit seeking to recover an amount of Kshs. 160,760.00 being the cost of repair of his motor vehicle registration number KBL 049Y following an accident along North Airport Road involving two other vehicles, that is; motor vehicle registration No. KAP 885 and motor vehicle registration No. KAX 223Z.

3. The Defendants as at the time of filing of the suit in the lower court were indicated in the plaint as Akash Kumar Ghanshambhai (owner of motor vehicle registration No. KAX 223Z) and George Ochieng (owner of motor vehicle registration No. KAP 588N) as the 1st and 2nd Defendants respectively.

4. On 30th January 2020, after three (3) different amendments to the plaint, the Appellant herein, Afrodane Industries was added to the suit as the 1st Defendant and indicated as the registered owner of motor vehicle registration No. KAP 885N. However, George Ochieng still remained as the 2nd Defendant but was now indicated to be the be the registered owner of motor vehicle registration No. KAX 223Z.

5. On 7th July 2020, the Respondent through his Advocate applied to court for a default judgment against the 1st Defendant, Afrodane Industries for failing to enter appearance despite having been served with the summons. The default judgment was accordingly entered on 19th January 2022 for a sum of for Kshs. 160,760/- and a decree accordingly extracted.

6. Following the entry of the default judgment, the Appellant herein filed a Notice of Motion Application dated 25th November 2022 for the setting aside the court's ex-parte judgment of 19th January 2022. In the application, the Appellant was (perhaps erroneously) indicated as the 3rd Defendant.

7. On 6th June 2023, the lower court delivered its Ruling dismissing the Appellant's application dated 25th November 2022, thereby maintaining the default judgment against the Appellant.

The Appeal

8. Aggrieved by the decision of the lower court, the Appellant, vide its memorandum appeal dated 8th June 2023 lodged an appeal to this court, raising thirteen (13) grounds of appeal which I need not reproduce in this judgment since I find them quite verbose and repetitive.

9. From the grounds of appeal, I note that the main and single issue in this appeal is the Appellant's dissatisfaction with the lower court's decision not to allow its Notice of Motion Application dated 25th November 2022 for the setting aside the court's ex-parte judgment.

10. The appeal was canvassed by way of written submissions. The Appellant's submissions is dated 18th September 2024 whilst that of the Respondent is dated 4th June 2024.

Appellant's submissions

11. The Appellant submitted that the trial court committed an error of law and of fact when the court found that the Appellant was duly served with the summons. According to the Appellant evidence on record indicated that a wrong party was served with the summons. That while the affidavit of service indicates that service was effected in Kitale, the Appellant has never had an office in Kitale or conducted any business thereat.

12. The Appellant further submitted that the trial court erred in failing to accede to its request to have the process server, Mr. Robert K. Mutuku, who allegedly served the summons to be summoned to court for purposes cross-examination on the contents in the return of service.

13. It is the Appellant's argument that they have a good defence which raises triable issues and therefore the trial court erred in failing to grant them an opportunity to ventilate the same in court, at the hearing of the suit.

14. That in any event, that they have already deposited a security in court, a sum of Kshs. 400,000/- being the decretal sum and therefore allowing them to defend the suit would not in any way prejudice the Respondent.

15. In the premises, the Appellant prayed for orders that the appeal be allowed and that the trial court's Ruling and of 6th June 2023 and the consequential order be set aside.

Respondent's Submissions

16. On his part, the Respondent supported the trial court's Ruling and urged this court to uphold the same. According to the Respondent, the Appellant was properly served but refused to enter appearance or file any defence.

17. The Respondent submitted that the Appellant did not challenge by evidence, the averments by the process server in the return of service but merely denied the same in his submissions.

18. On the Appellant's submissions that the draft defence attached to their application raises triable issues, the Respondent submitted that the defence is a bare denial. That in any event, the Appellant in the said draft defence does not deny being the owners of motor vehicle registration No, KAP 588N which was involved in the accident in question.

Analysis and determination

19. This being a first appeal, the duty of this court is to reevaluate and reassess the evidence tendered at trial with a view of reaching its own conclusion, keeping in mind that unlike the trial court, it did not have the advantage of observing the demeanor of the witness and hearing their evidence first hand. See the Court of Appeal decision in Peters vs Sunday Post Limited [1958] EA where the court stated that; -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses.....the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

20. The court is equally aware that an appeal to this court is by way of retrial and this court is not bound by the findings of the trial court merely because it did not have the advantage of hearing the witnesses testify and seeing their demeanor as was held in the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA where the court stated that: -

> " ...I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

21. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that: -

> " 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

22. Order 10 rule 11 of the Civil Procedure Rules is the applicable provision of the law on the setting aside of an interlocutory ex-parte judgment where no appearance and defence has been filed. It provides that a court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

23. I note that the Appellant in his application before the trial court cited the wrong provisions of the Civil Procedure Rules, however in the spirit of Section 1A and 1B of the *Civil Procedure Act* and Article 159(2)(d) of *the Constitution*, I will excuse the error and proceed and deal with the substantive issues in the Appeal/application.

24. The Court of Appeal in James Kanyiita Nderitu & Another v Marios Philotas Ghikas & another Civil Appeal No 6 of 2015 [2016] eKLR discussed extensively the discretionary power of courts when dealing with applications for setting aside ex-parte judgments in the following terms; -

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v Shah (supra), Patel v EA Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v Kubende [1986] KLR 492 and CMC Holdings v Nzioki [2004] 1 KLR 173).
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> In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion." [Emphasis added]

25. From the above cited authority by the Court of Appeal, it is clear that the court must first of all ascertain whether there is a regular judgment on record and secondly, if the judgment is regular, the court then is to proceed and determine whether the applicant (draft) defence raises triable issues, necessitating that the matter be heard and determined on its merits.

26. Flowing from the above, I will now proceed to determine the application as hereunder:

Whether there is a regular judgment on record

27. The gist of the application by the Appellant before the trial court was that they were never served with the summons to enter appearance. According to the Appellant, they only became aware of the suit on 4th November 2022 when the Respondent, through an auctioneer commenced execution against them.

28. The Respondent on the other hand maintained that the Appellant was properly served.

29. From the record, I note that according to the return of service sworn by Robert K. Mutuku dated 15th May 2020, it is deponed that service was effected upon the defendant at Kinale Township within Kiambu County on one Mr. Mbugua who introduced himself as the Appellant's transport manager. That the said Mr. Mbugua accepted service but declined to sign the same in acknowledgement.

30. I have scrutinized the court record and note that in its application before the trial court for setting aside the ex-parte judgment, the Appellant simply denied service. I agree with the Respondent's position that the affidavit of service was not in any way impeached by the Appellant.

31. Despite making suggestions, both in its certificate of urgency and the affidavit in support of the application for setting aside, there was no single prayer in the application by the Appellant to have the process server summoned in court for the purposes of cross-examination on the contents of the return of service.

32. The affidavit of service having not been challenged or in any way impeached by the Appellant, like the trial court, I am satisfied that there was proper service of the summons on the appellant.

33. Consequently, I hold and find that the ex-parte judgment entered by the lower court was a regular one.

Whether the defence raises triable issues

34. As indicated in the Court of Appeal decision of James Kanyiita Nderitu (supra) cited above, notwithstanding the fact that the judgment was a regular one, the main concern of the court is to do justice to the parties. This court is obligated to interrogate whether, it is in the interest of justice, that regular judgment ought to be set aside, particularly where there is a defence that raises triable issues.

35. Consequently, I must therefore determine whether the Appellant has a meritorious defence. A meritorious defense is a prima facie defense that should be tried or adjudicated. In other words, it is a defense that raises triable issues and should be heard on its merits. A triable issue is said to exist if there is a dispute in the facts, which dispute can only be resolved after ventilation in a full hearing. In the case of Giciem Construction Company v. Amalgamated Trade & Services LLR No 103 (CAK) where the court stated:

> " As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment."

36. I have carefully reviewed the proceedings, right from when the suit was first instituted on 30th April 2013 and the several subsequent amendments of the plaint by the plaintiff, culminating into the amendment of 30th January 2020 where the Appellant was ultimately enjoined as a party. Without going into the details of the amendments, this court takes the position that it is necessary to allow the Appellant participate fully in the matter by allowing them file their defence.

37. Further, I note that the Appellant's position in their draft defence is that its motor vehicle registration No. KAP 588N was never involved in the accident in question. This, again, in my view, is question that needs to be settled by giving the Appellant an opportunity to ventilate its defence in court.

38. Accordingly, I find that the Appellant has sufficiently demonstrated that there are triable issues that call for adjudication.

39. In reaching the above decision, I am guided by the decision in the case of Sebei District Administration vs Gasyali & others (1968) EA 300, where Sheridan J. observed 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."

40. The Appeal is therefore allowed in the and the trial court's Ruling of 6th June 2023 and all consequential orders are hereby set aside in the following terms; -

    i. The ex parte judgment entered on 19th January 2022 against the Appellant herein and all consequential orders be and are hereby set aside.

    ii. The Appellant is hereby granted leave to file its statement of defence within 14 days from the date of this judgment.

    iii. The amount of Kshs. 400,000/- already deposited by the Appellant as security to remain so deposited until the hearing and final determination of the suit.

    iv. The matter shall be mentioned before the trial court on 28th November 2024 for the purposes of taking directions on the hearing and expeditious disposal of the case.

41. I direct that each party to bear their own costs of this Appeal. Costs in the lower court be in the cause.

42. It so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 7TH DAY OF NOVEMBER 2024

ADO MOSES

JUDGE

In the presence of:

Moses – Court Assistant

Ms. Owino..... for the Appellant

Onderi.....for the Respondent