



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 102 OF 2017

SHEILA WAMBUI MUTURI.....APPELLANT

VERSUS

PETER MACHARIA MUIRU.....RESPONDENT

(Being an appeal from the order of the Hon. Nyaloti Chief Magistrate

delivered on 14th February 2017 in Nairobi Cmcc no.4698 of 2014)

JUDGMENT

1. The Respondent (Peter Macharia Muiro) sued the Appellant (Sheila Wambui Muturi) in Nairobi Civil Case 4698 of 2014 vide a Plaint dated 19th August 2014 praying and seeking the following:

- a. Special damages of Kshs 266,407/=.
- b. General damages for pain and suffering.
- c. Future medical expenses.
- d. Costs of suit and interest.

2. The appellant filed her defence dated 28th of November, 2014 denying the claim. An interlocutory judgment was entered on 26th September, 2014 against the appellant. The appellant then moved to Court to set aside the said interlocutory judgment in which the trial Magistrate set aside the ex-parte judgment against the defendant, awarded the respondent throw away costs of Kshs.100,000/= and gave orders that the case proceeds from where it had reached.

3. The Appellant being aggrieved by the ruling proceeded to file an appeal dated 17th April, 2018 raising the following grounds:

- a. **That the Learned Trial Magistrate erred in Law and in fact in awarding the Respondent throw away costs of Kshs.100,000/= which amount was not only manifestly excessive but lacked any justification or qualification.**
- b. **That the Learned Trial Magistrate erred on Law and in fact by abusing discretionary powers and consequently failing to act judicially in the circumstances of this case.**
- c. **That the learned trial magistrate erred in law and in fact in failing to consider that the appellant was not to blame for the delay in this matter but her Insurers who had also offered an explanation for the delay.**
- d. **That the learned trial magistrate erred in Law and in fact in holding that the interlocutory judgment was regular and proper in Law while at the same time making a finding that “a defence was filed on the 1st December 2014, there is no need of filing a second draft defence filed together with the application.”**
- e. **That the learned trial magistrate erred in law and in fact in ordering that “the proceedings of 22nd September 2016 are not set aside as the Defendant was duly represented” whereas such orders had not been prayed for in the application before**

the learned trial magistrate.

f. That the Learned Trial Magistrate erred in Law and in fact in disallowing the Appellant to adopt her statement of defence as per the draft Amended Defence which contained the Defendant's written statement and documents unlike the defence filed on 1st December, 2014.

g. That the Learned Trial Magistrate erred in Law by failing to follow the doctrine of stari deis in authorities cited to her by the Appellant in respect to case law decided by the Court of Appeal.

4. The court gave directions for the appeal to be disposed by way of written submissions. Counsel for both parties namely Omboga & Co. Advocates and Muthomi & Karanja Advocates filed their submissions on 23rd October 2020 and 9th November, 2020 respectively.

5. The duty of this court as the first appellate court, is to re – evaluate and re-examine afresh the evidence and arrive at its conclusion having regard to the witnesses stated in *Williamson Diamonds Limited vs. Brown (1970) EA in the following words:*

“This court must reconsider the evidence, evaluate itself and draw its own conclusions through it shall always bear in mind that it had neither seen or heard the witnesses make due allowance in that respect.”

6. A summary of the adduced before the lower court will suffice.

7. The respondent stated that on or about 28/08/2012 he was riding his motorcycle registration No. KMCV 957H along Windy Ridge road in Karen when the appellant's motor vehicle registration No. KBB 701W Toyota Vitz while being negligently driven on the same road, lost control and hit his motor bike. As a result the respondent suffered severe injuries, loss and damage. He sued the respondent and the trial magistrate entered an interlocutory judgment against the appellant on 26th September 2014 in default of defence and appearance.

8. The respondent's argument was that the application to set aside the interlocutory judgment was filed two years later and it was an afterthought made in bad faith.

9. The Appellant on the other hand, admitted that an accident occurred but denied that the said accident was caused or contributed to by the negligence on her part. She denies that there was inordinate delay in entering appearance and argues that she should not be punished for acts or omissions of third parties. She claims to have known of the interlocutory judgment on the 1st July, 2015 when her matter was listed for form proof.

10. Mrs Wachira for the appellant submitted that the appeal arises from a ruling/order made in respect to an Application dated 15th September, 2016 to set aside the interlocutory judgment entered in the suit in default of appearance. She had also sought leave to file a defence.

11. The appellant contends that she was served with summons on 27th August, 2014 and she transmitted them to her brokers who in turn delivered them to the Fidelity Insurance Company. She argues that the delay had been occasioned by circumstances beyond her.

12. Learned counsel for the appellant submitted that the appellant's defence raises triable issues including the date of accident and that the respondent substantially contributed to the subject accident. She further submitted that the application was allowed but the appellant was ordered to pay the respondent throw away costs of Kshs. 100,000/=, which was conditional to her matter being heard. This prompted the appellant to move this court through an application for an order of stay of proceedings pending determination of the appeal which application was allowed.

13. Counsel further submits that Kshs. 100,000/= for throw away costs was manifestly excessive and the respondent's claim arose from a road traffic accident that was alleged to have occurred in 2012. The counsel claims that the trial magistrate was guided by the respondent's submissions. It is her submission that the award of Kshs 100,000/= was not justified and the learned trial magistrate did not act judicially in the circumstances of the case.

14. It is her contention that the throw away costs of Kshs.100,000/= was not only draconian but not sustainable in our present day economy and it amounts to denying a party justice when it makes conditions precedent before one addresses the court.

15. Finally counsel submits that the trial court's decision prejudiced the appellant who was denied a chance to file her second draft defence.

16. Mr. Karanja for the respondent submitted that in all circumstances and background to this appeal there has been an inordinate and unjustifiable delay by the appellant which is unwarranted and consequently prejudicial to the respondent. That the appellant was determined to delay the hearing and determination of the dispute before the court.

17. Learned counsel explained that the appellant filed her memorandum of appeal on 9th March, 2017 which is four years ago, and had failed to prosecute it until the respondent approached the court in 2019 through an application seeking dismissal of the appeal for want of prosecution. The said delays in both the lower and high courts has occasioned unnecessary costs to the respondent.

18. He relied on **Kenya Power and Lighting Co. Limited vs. Abdulla Mohamed and another (2017) eKLR;** where the court held:

“that since the court of appeal is only entitled to interfere with trial court discretionary power if one or more of the following matters are established i.e. the trial court misdirected itself in law, misapprehended the facts. Took account of consideration of which it should not have taken account and its decisions, albeit a discretionary one is plainly wrong.”

19. The respondent argued that the allegation that the throw away costs ordered by the trial court was manifestly excessive is without merit since the issue is left to the discretion of the court after considering the circumstances of each case. The counsel relied on *Jacklyn Wanjira Njeru Vs. Equity Bank (Kenya) Limited and another (2020) eKLR* where the Court held:

“it is settled law that court’s discretion should not be exercised to assist a party that has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

20. Counsel submits that the trial magistrate was legally and factually in law right in awarding Kshs.100,000/= as costs and did not error in law. He relied on *Shanzu Investments Limited Vs. Commissioner of Lands (1993) eKLR* where the court said:

“the court has a very wide discretion under Order 10 Rule 11 of the Civil Procedure Rules, 2010 and there are no limits and restrictions on the discretion of the trial court except that if a judgment is varied must be done on terms that are just.”

He therefore urged the honourable court to dismiss this appeal with costs.

Analysis and Determination

21. This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. See *Selle & another Vs. Associated Motor Boat Co.Ltd & others (1968)E.A 123 (supra)*.

22. Having considered the grounds of appeal, evidence on record and both submissions I find the issues falling for determination to be as follows;

- a. Whether the trial magistrate erred in law and fact in finding that the interlocutory default judgment was regular and proper in law.
- b. Whether the learned trial Magistrate erred in law and fact in law in awarding the Respondent throw away costs of Kshs.100,000/=.
- c. Whether this Honourable Court can interfere with discretionary powers of the learned magistrate.

Issue (a) whether the trial magistrate erred in law and fact in finding the interlocutory default judgment was regular and proper in law.

23. Indeed as it has been submitted the appellant took time before entering appearance. On her part she does not see any delay in that.

24. The appellant submitted that this appeal stems from the fundamental principle of natural justice which states that, no party should be condemned unheard. That the well-established principles of setting aside interlocutory judgments are laid out in the case of; *Patel vs East Africa Cargo Handling Services Ltd (1974) EA 75* where it was held:

“There are no limits or restrictions on the judge’s discretion to set aside or vary an ex-parte judgment 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 conditions on itself to fetter the wide discretion given it by the rules.”

25. However, the discretion of the Court must always be exercised judicially with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its own unique facts and circumstances. Among the factors to consider is whether the respondent will suffer any prejudice if denied an opportunity to be heard on merit. It therefore calls for interrogation of the appellant’s case as to whether it raises any triable issues

Similarly in the case of; *Tree Shade Motors Ltd vs D. T. Dobie & Another (1995-1998) IEA 324*, it was held that:-

“Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff’s claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.”

26. My finding on this issue is that there was nothing irregular about the interlocutory judgment that had been entered against the Appellant. The said judgment was entered following the appellant’s failure to enter appearance and/or file defence. In exercise of her discretion and considering that a defence had been filed (*though late*) the learned trial magistrate set aside the interlocutory judgment to give the Appellant an opportunity to be heard.

Issue (b) whether the trial magistrate erred in law and fact in awarding the Respondent throw away costs of Kshs.100,000/=

27. Under **Order 10 rule 11** of the Civil Procedure Rules under which the appellant made the application to set aside the default judgment, the court had unfettered discretionary power to set aside or vary the judgment on such terms that are just. See **Shanzu Investments Ltd v. Commissioner of Lands, CA No. 100 of 1983** and (ii) **Patel v. East Africa Cargo Handling Services (supra)**.

28. I have perused the ruling of 14th February 2017 where throw away costs of shs 100,000/= were awarded. The learned trial magistrate did not explain how she arrived at that figure. It must also be borne in mind that what she was setting aside was an interlocutory judgment and not a final judgment. So what were these thrown away costs that the Appellant had incurred? She already awarded costs of the application to the respondent, and that was sufficient. I therefore fault the trial court for making the said award of Kshs 100,000/= which is not supported at all.

Issue (c) Whether this Honourable Court can interfere with discretionary powers of the learned magistrate

29. In the case of **Mbogo & Anor v Shah 1968 EA** pg 15 it was held:

“A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

30. As I have already indicated above, the trial court erred in awarding thrown away costs of shs 100,000/= to the respondent when she had already awarded costs of the application and there was no final judgment entered. This was unjust to the appellant and it amounted to unfairly locking her out of the proceedings as the shs 100,000/= became a condition before she could proceed. In a situation such as this I find that this court may interfere with the unjust exercise of such discretion.

31. The appellant filed a 2nd draft defence which the court again rejected. No reason was again given for this. She again declined to set aside the proceedings of 22nd September 2016 which were based on the interlocutory judgment which had been set aside. That could only have remained the position if both parties consented to it. Having set aside the interlocutory judgment the only reasonable thing was to set aside the proceedings of 22nd September 2016 for the matter to start de novo.

32. The upshot is that the appeal has merit and is allowed and the following orders made:

- (i) The order awarding the respondent shs 100,000/= as thrown away costs is set aside.
- (ii) The respondent is granted leave to amend her defence and the amended defence dated 27th November 2014 be adopted as the defence.
- (iii) Directions to be taken before the trial court on how the matter should proceed.
- (iv) A mention date within 30 days to be fixed before the trial court.
- (v) Costs of the appeal to the appellant in any event.

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 13TH DAY OF APRIL 2021 IN OPEN COURT AT MILIMANI NAIROBI

H. I. ONG'UDI

JUDGE