REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 378 OF 2017

NARMADA BUILDERS.....APPELLANT

-VERSUS-

JUSTUS MUTUNGI MUTUA.....RESPONDENT

***(*Being an appeal against the ruling and order of Honourable K. I. Orenge (Mr.)**

(Senior Resident Magistrate) delivered on 14th July, 2014

in Milimani CMCC no. 6043 of 2014*)*

JUDGEMENT

1. At the onset, the respondent herein instituted a suit before the Chief Magistrate's Court by way of the plaint dated 17th September, 2014 and sought for reliefs against the appellant in the nature of general and special damages plus costs of the suit and interest thereon.

2. The respondent pleaded in his plaint that he was at all material times an employee of the appellant, working as a general labourer; and that it was an implied term of the employment that the appellant would ensure to provide the respondent with a safe and suitable work environment.

3. The respondent pleaded in his plaint that sometime on or about 11th July, 2014 while in the course of his employment, the appellant's agent assigned him with the duty of carrying building stones, the result of which the respondent sustained serious injuries.

4. The respondent attributed his injuries to breach by the appellant of its contractual and/or statutory obligations owed to the respondent, by setting out their particulars in the plaint.

5. Subsequently, upon the request of the respondent, an ex parte interlocutory judgment was entered against the appellant on 22nd June, 2015 and the matter proceeded for formal proof hearing. In the end, judgment was entered as prayed in the plaint by the trial court on 10th May, 2016.

6. Consequently, the appellant filed the Notice of Motion dated 20th January, 2017 and sought to set aside the ex parte judgment and further sought for leave to file its statement of defence. The Motion was opposed by the respondent.

7. Upon hearing the parties on the aforesaid Motion, the trial court dismissed the Motion with costs vide its ruling delivered on 14th July, 2017.

8. Being aggrieved by the aforementioned ruling, the appellant sought to challenge the same by way of an appeal. Through its memorandum of appeal dated 26th July, 2017 the appellant put in the following grounds:

> **i. THAT the learned trial magistrate erred in law and in fact in holding that the appellant's defence lacked merit despite the appellant denying that there was a valid contract of employment between the appellant and the respondent at the alleged time of the accident, in its draft defence annexed to the said application.**

ii. THAT the learned trial magistrate erred in law and in fact in finding that the draft defence did not raise any triable issues.

iii. THAT the learned trial magistrate misdirected himself by relying on letters written by the appellant's advocates on a "without prejudice" bass to conclude that there were binding negotiations taking place between the parties.

iv. THAT the learned trial magistrate erred in law and in fact in finding as a matter of fact that there was a defence filed which the magistrate went ahead to declare as an afterthought while there was no defence filed by the appellant and the appellant had merely approached the court seeking to be allowed to file a defence to the suit.

v . THAT the court misdirected itself by ignoring the appellant's written submissions in making its determination.

9. This court gave directions for the parties to file written submissions on the appeal. The appellant vide its submissions dated 23rd July, 2021 argues that its draft statement of defence which was annexed to the Motion before the trial court constitutes triable issues and that the appellant ought to be given the chance to challenge the respondent's claim against it.

10. The appellant cites inter alia, the case of **AAT Holdings Ltd v Diamond Shields International Ltd (2014) eKLR** where the court held that:

"a trial must be ordered if a bona fide triable issue is found or one which is fairly arguable is found to exist. But a triable issue does not mean that which will succeed. It means an issue which raises a prima facie defence and which should go to trial for adjudication."

11. The appellant further argues *inter alia*, that the respondent does not stand to suffer prejudice should the orders sought be granted since he will have an opportunity to respond to the appellant's issues raised on defence at the trial.

12. In retort, the respondent submits that despite acknowledging receipt of the summons to enter appearance together with the pleadings, the appellant did not bother to enter appearance or file its statement of defence, and hence the interlocutory judgment in place is regular.

13. The respondent further submits that subsequently, the appellant chose to negotiate an out-of-court settlement rather than seek to set aside the interlocutory judgment, and hence the appellant is not deserving of the orders now sought.

14. For all the foregoing reasons, the respondent is of the view of that the appeal must fail.

15. I have considered the contending submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the trial court. It is clear that the appeal fundamentally lies against the trial court's decision to dismiss the appellant's application seeking to set aside the ex parte interlocutory judgment. I will therefore deal with the grounds of appeal contemporaneously under the following limbs.

16. The *first* limb of appeal concerns itself with whether the learned trial magistrate acted correctly in declining to set aside the ex parte interlocutory judgment in place.

17. In the Motion dated 20th January, 2017, the appellant averred that upon receiving the summons to enter appearance and pleadings, its advocates on record took steps to file the memorandum of appearance, only to discover that the interlocutory judgment had already been entered.

18. The appellant through its deponent, Mansukh Naran Jeshani, also averred that it took time for the deponent who was the supervisor at the time, to retrieve the necessary information to enable the advocates prepare a draft statement of defence.

19. It is the assertion of the aforementioned deponent that the draft statement of defence which was annexed to the Motion raises triable issues which ought to be heard on merit, and that the respondent does not stand to be prejudiced if the orders sought therein are granted.

20. In his replying affidavit to the Motion, the respondent stated that though the respondent was aware of the existence of the interlocutory judgment at all material times, it took no action to have the same set aside at the earliest opportunity.

21. The respondent further stated that the draft defence does not raise any triable issues to warrant a granting of the orders sought in the Motion.

22. Upon hearing the parties on the Motion, the learned trial magistrate analyzed that the appellant had deliberately sought to delay the course of justice and therefore found no merit in the Motion.

23. Upon my re-examination of the material, I note that the question of service of summons and the pleadings is not disputed. It is equally not in dispute that there was a delay in bringing the Motion from the time of entry of the interlocutory judgment.

24. This therefore brings me to the subject on whether the appellant's draft statement of defence raises triable issues. Upon my perusal of the impugned ruling, I note that the learned trial magistrate did not specifically address his mind to this subject.

25. In determining whether or not to set aside an ex parte/default judgment, a court is required to consider whether a party has a defence which raises triable issues, even where service of summons is found to be proper. In so saying, I cite with approval the rendition in the case of **Tree Shade Motors Ltd v D.T. Dobie & Another (1995-1998) IEA 324** relied upon in **M/S Jondu Enterprises Limited v Spectre International [2019] eKLR** thus:

> **"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. In addition to the case of **AAT Holdings Ltd v Diamond Shields International Ltd (2014) eKLR** cited by the appellant and mentioned hereinabove, the phrase 'triable issue' was defined by the Court of Appeal in the case of **Ternic Enterprises Limited v Waterfront Outlets Limited [2018] eKLR** thus:

> **"…a triable issue" is an issue which raises a prima facie defence and which should go to trial for adjudication."**

27. The Court went on to appreciate that:

> "The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend."

28. From my study of the appellant's draft statement of defence, I observed that it pleads that at the time of the alleged accident and injuries, the respondent was not an employee of the appellant and that during the course of the respondent's employment with the appellant, the latter provided a safe working environment to the former.

29. The appellant further pleaded in its draft statement of defence that if at all the respondent sustained the injuries in the manner pleaded in the plaint, then the said respondent was irregularly at the appellant's work station on the material date.

30. In my view, the foregoing consist of triable issues which can only be adequately ventilated at the hearing of the suit.

31. In considering whether to set aside a default judgment, a court of law is also required to ascertain whether the respondent stands to be prejudiced. I equally note that the learned trial magistrate did not delve into this subject in his analysis.

32. In his supporting affidavit, Mansukh Naran Jeshani asserted that the respondent does not stand to be prejudiced. The respondent on his part did not address this subject.

33. In my view and upon my re-examination of the pleadings and material tendered before the trial court, there is nothing to indicate that the respondent would be prejudiced in a manner that cannot be adequately compensated by way of costs, if the interlocutory judgment is set aside.

34. Upon taking into account all the foregoing factors hereinabove, I am convinced that it would be a proper exercise of my discretion to interfere with the impugned ruling and to grant the appellant the opportunity of defending the claim, upon setting aside the interlocutory judgment.

35. The *second* limb on appeal concerns itself with whether the learned trial magistrate overlooked the appellant's submissions.

36. From my reading of the impugned ruling, I have not come across anything to indicate that the learned trial magistrate; in making his analysis; ignored the submissions of either party.

37. In the end, I will allow the appeal in terms of prayers a), b) and c). Resultantly:

> **i. The ruling delivered on 14th July, 2017 is hereby set aside and is substituted with an order allowing the Motion dated 20th January, 2017.**
>
> **ii. The ex parte/interlocutory judgment entered on 22nd June, 2015 and all consequential orders and proceedings are hereby set aside and the suit is hereby reinstated.**
>
> **iii. The appellant is granted leave to file and serve its statement of defence within 14 days from today.**
>
> **iv. Costs of the Motion dated 20th January, 2017 to abide the outcome of the suit.**

v. In the circumstances of this appeal, a fair order on costs is to order each party to bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent