THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO. 35 OF 2019

THYAKA NTHENYA JANE.....1ST APPELLANT

ANDREW MBUVI KYENGO.....2ND APPELLANT

VERSUS

MULANDI MUTINDA.....RESPONDENT

(*An Appeal from the ruling and order of Hon. D. Wangeci, Senior Principal Magistrate,*

delivered on 9th September, 2019 in Voi Senior Principal Magistrate's Court

Civil Case No. 113 of 2017).

JUDGMENT

1. The suit against the defendants (appellants) in the lower Court was that on 8th December, 2016 the plaintiff (respondent) was travelling in motor vehicle registration number KCE 739P Mitsubishi FH bus as a fare paying passenger from Nairobi to Mombasa when the 2nd appellant, Andrew Mbuvi Kyengo, drove, controlled and/or managed the said motor vehicle so carelessly and without regard of the safety of the passengers. It was the respondent's case that the said appellant caused the said motor vehicle to overturn and/or roll at Kasarani bridge along the Nairobi-Mombasa highway causing the respondent, Mulandi Mutinda, to sustain severe injuries. The respondent averred that the 2nd appellant was the driver of the motor vehicle registration number KCE 739P Mitsubishi FH, while the 1st appellant, Thyaka Nthenya Jane, was the registered owner of the aforementioned vehicle.

2. The appellants filed a statement of defence wherein they denied ownership of motor vehicle registration No. KCE 739P Mitsubishi FH and the occurrence of the said accident and/or negligence on their part. The appellants averred that even if an accident occurred, the respondent was not lawfully travelling in the said vehicle.

3. The hearing of the main suit proceeded in the absence of the appellants and judgment was entered in favour of the respondent as against the appellants for Kshs. 2,000,000/= damages for pain and suffering and loss of amenities, Kshs. 75,846.00 as special damages, Kshs. 300,000/= being the costs of prosthesis and Kshs. 2,400,000/= for diminished earning capacity.

4. On 16th July, 2019, the appellants filed a Notice of Motion application of the same date, where they sought stay of execution of the judgment entered against them and for the consequential decree to be set aside. They also sought to be granted leave to file their defence in terms of the draft statement of defence they had exhibited therein.

5. The respondent in opposition to the said application, filed a replying affidavit sworn on 29th July, 2019. He deposed that the appellants were duly served with summons to enter appearance and that on 18th September, 2017, the respondent's Advocates on record were served with a memorandum of appearance and a statement of defence for the appellants, filed by the firm of Janet, Jackson & Susan (LLP) which categorically stated that they had been appointed to act for the appellants.

6. In the lower Court, a ruling was delivered on 9th September, 2019, where the Court allowed the appellants' application dated 16th July, 2019 and the law firm of Atuti & Associate Advocates was granted leave to come on record as the Advocates for the appellants in place of Janet, Jackson & Susan Advocates. The Trial Magistrate declined to set aside the judgment entered against the appellants and the consequential decree. She also declined to grant them leave to file a statement of defence. The appellants were ordered to pay the respondent the costs for the said application.

7. The appellants were dissatisfied with the decision of the Trial Magistrate and on 23rd September, 2019, they filed a memorandum of appeal raising the following grounds of appeal-

(i) That the Trial Court erred in law and fact by failing to find that there were sufficient reasons warranting the setting aside of the *exparte* judgment issued in favour of the respondent;

(ii) That the Trial Court erred in law and fact by failing to find that the defence filed by the appellants raised triable issues which would entitle the Court to grant the appellants leave to defend the suit;

(iii) That the Trial Court erred in law and fact by punishing the appellants due to the mistakes of Janet, Jackson & Susan Advocates;

(iv) That the Trial Court erred in law and fact by failing to find that injustice would be occasioned on the appellants if the respondent was allowed to proceed with the execution exercise without hearing the appellants' defence;

(v) That the Trial Court erred in law and fact by failing to find that the respondent could not execute the entire decree in the sum of Kshs. 4,775,846.00 against the appellants upon a declaration being made in Voi Principal Magistrates' Court Civil Suit No. 113 of 2017; Mulandi Mutinda v Invesco Assurance Company Limited, that the insurance company was liable to satisfy the said decree to the extent of Kshs. 3,000,000/=;

(vi) That the Trial Court erred in law and fact by delivering a ruling that was not compliant with Order 21 Rule 3 of the Civil Procedure Rules, 2010; and

(vii) That the Trial Court erred in law and fact in arriving at a decision that was wholly against the weight of the evidence and the law.

8. The appellants' prayer is for the appeal to be allowed and for the ruling and order of the Senior Principal Magistrate Hon. D. Wangeci delivered on 9th September, 2019 to be set aside and in lieu thereof, the appellants' application dated 16th July, 2019 be allowed with costs to the appellants.

9. The appeal was canvassed by way of written submissions. On 24th July, 2020, the law firm of Morara Omoke & Co. Advocates filed written submissions on behalf of the appellants. The respondent's submissions were filed on 7th August, 2020 by the law firm of Muli & Company Advocates.

10. Mr. Musyoki, learned Counsel for the appellants submitted that the Advocates appearing for the appellants before the Trial Court failed to notify them of the hearing date and also failed to attend Court on the hearing date. That the said Advocates also failed to file written submissions in defence of the appellants. He stated that in her ruling, the Trial Magistrate held that the appellants did not demonstrate any sufficient cause as to their failure to attend Court during the hearing. He submitted that the appellants had demonstrated an excusable mistake visited upon them by their Advocates.

11. He relied on the case of **CMC Holdings Ltd v James Mumo Nzioki** [2004] eKLR, where the Court when dealing with a similar issue held that the Court's discretion in deciding whether or not to set aside an *exparte* order is to ensure that a litigant does not suffer injustice or hardship as a result of, among other things, an excusable mistake or error. He was of the view that the learned Magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that their Counsel did not inform them of the hearing date was true and the effect of the same on the *exparte* judgment that was entered as a result of the non-appearance of the appellants.

12. It was submitted by the appellants' Counsel that the draft statement of defence raised triable *bonafide* issues that required further interrogation by the Court during a full trial since the said issues go to the root of the subject matter in dispute. He further submitted that a triable issue need not to be an issue that would succeed, but just one that warrants further intervention of the Court.

13. He relied on the provisions of Order 10 Rule 11 of the Civil Procedure Rules, 2010 and submitted that Courts have established principles and tests for setting aside *exparte* judgments since Courts have unfettered, unlimited and unrestricted jurisdiction to do so. He submitted that the tests for setting aside an *exparte* judgment are whether there is a defence on the merits; whether there would be any prejudice to the plaintiff and what the explanation for the delay is, as was held by the Court in the case of **Marion Kaairi Mbui v Elisha Mbogo Nthiga** [2016] eKLR and **Patel v E.A. Cargo Handling Services Ltd** [1974] EA 75.

14. Mr. Musyoki stated that the respondent obtained a judgment for the sum of Kshs. 3,000,000/= and a notice thereof was sent to and was acknowledged by Invesco Assurance Company Limited. He also stated that due to failure by the insurer to satisfy the said judgment, the respondent proceeded and sought execution of the entire decretal amount of Kshs. 4,775,846.00. He submitted that Article 50 of the Constitution of Kenya, 2010 entrenches the fundamental right to a fair hearing thus the appellants are not supposed to be condemned without being accorded an opportunity to air their part of the story and challenge the respondent's evidence.

15. Mr. Muli, learned Counsel for the respondent submitted that upon filing of the suit herein, the respondent served the appellants with summons to enter appearance and that they subsequently entered appearance and filed a statement of defence through the firm of Janet, Jackson and Susan Advocates. It was stated that the appellants' insurer referred the respondent for a second medical examination which he attended. Mr. Muli indicated that the matter was scheduled for hearing on 2nd July, 2018 and that the respondent served the appellants with a hearing notice but despite proper service, they failed to attend Court on the said date and the matter proceeded for hearing in their absence.

16. He indicated that the respondent notified the appellants of the judgment once it was delivered and when the information elicited no response, the respondent proceeded to request for a decree and certificate of costs which were issued on 8th October, 2018, which he served upon the appellants. He stated that the respondent instituted a declaratory suit against the appellants' insurer but despite service, the appellants neither entered appearance nor filed a defence, thus the matter proceeded undefended.

17. Mr. Muli submitted that in the declaratory suit, judgment was entered in favour of the respondent herein as against the appellants' insurer for Kshs. 3,000,000/= together with costs and interest. He indicated that the matters before the Trial Court proceeded with the full knowledge of the appellants and owing to the insurance contract between an insurer and the insured, legal representation is invariably procured by the insurer on behalf of the insured. He submitted that the appellants forwarded documents to their insurer but failed to follow up on the progress of the matter with their insurer, thus if they were dissatisfied with how their insurer handled the matter, they should take up the issue with them or the firm of Janet, Jackson & Susan Advocates.

18. The respondent's Counsel submitted that the conditions for setting aside an *exparte* judgment are that the applicant must demonstrate that he or she will suffer prejudice, that he or she has a triable defence and must offer sufficient explanation on the delay as stated in the case of **Abdalla Mohammed & another v Mbaraka Shoka** [1990] eKLR. He further submitted that both the defence on record and the draft defence attached to the present application constitute mere denials, as they do not raise any triable issues and are therefore not meritorious. He relied on the case of **Blue Sky EPZ Limited v Natalia Polyakova & another** [2007] eKLR, where the Court held that in the case of a defence, a mere denial or a general traverse will not amount to a defence, as a defence must raise a triable issue.

19. Mr. Muli also relied on the case of **Julius Mbaabu Marete v Tom Ayora & 3 others** [2018] eKLR, where it was held that it is not always that a Court will exercise its discretion in favour of party if the mistake is by its Advocate and that the Advocate must demonstrate genuine and acceptable mistakes not oughtright negligence as is the case in this matter. He stated that in circumstances such as these, a client would not be left without a remedy as professional indemnity insurance cushions Advocates against such acts of negligence by compensating the clients by way of damages. He submitted that a case belongs to the plaintiff and it is its duty to take steps to progress the case for the reason that leaving a case to an Advocate without checking on its progress is negligence on the part of the plaintiff.

20. He submitted that the delay in filing the application to set aside the interlocutory judgment in respect of which this appeal relates had not been explained. He held the view that if any prejudice would result in the event that the appeal is disallowed, the appellants have a remedy in both a suit for professional negligence and a suit against their insurer. Mr. Muli submitted that the judgment on record is not a default judgment but *exparte* judgment entered after the appellants filed a statement of defence but failed to attend Court. He further submitted that if the Trial Magistrate had allowed the appellants to file a new defence to the suit, it would have violated the law and procedure since there was already a defence on record.

21. Mr. Muli stated that the appellants were granted the opportunity to defend the matter but they chose not to participate in it. He further stated that the ineptitude of the appellants was demonstrated by the fact that despite being present in Court when judgment was delivered, they did not intimate that they wanted to set aside the judgment or bother to apply to set it aside soon thereafter. He relied on the case of **Jaldesa Tuke Dabelo v Electoral & Boundaries Commission & another** [2015] eKLR and submitted that the procedure set by law to deal with pleadings that are already on record is to amend and not to file multiple documents but in the present case, the appellants had not sought to amend the defence on record but to file a new defence, while one is still on record, which amounts to a total abuse of the court process.

22. The respondent's Counsel submitted that the insurer wrote to the respondent on without a prejudice basis, admitting liability for a maximum of Kshs. 3,000,000/=. He contended that nothing barred the respondent from executing the decree for the entire amount against the appellants since they are the proper parties to the suit and the respondent is not privy to the insurance contract entered between the appellants and their insurer. He further submitted that judgment was entered for Kshs. 4,775,846.00 together with costs and interest from the date of the judgment.

23. Mr. Muli relied on the case of **Rukenya Buuri v M'arimi Minyora & 2 others** [2018] eKLR and submitted that indolence is not a ground to set aside an *exparte* judgment as parties are expected to be vigilant and not indolent in instituting and maintaining matters before Court.

ANALYSIS AND DETERMINATION.

24. This Court has re-examined the entire Record of Appeal and given due consideration to the submissions by the parties' respective Counsel. This being a first appeal, the duty of the 1st appellate Court is to analyze and re-evaluate the evidence adduced before the lower Court and reach its own independent decision, while bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. See **Selle vs. Associated Motor Boat Co. (1968) EA 123**.

25. An appellate court will not interfere with the finding of fact by a Trial Court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles of fact or law in reaching his conclusion. See **Nkube vs. Nyamuro [1983]** LLR, 403-415 at 403. The issue that arises for determination is whether the appeal herein is merited.

26. Order 6 Rule 2(1) of the Civil Procedure Rules, 2010 provides as hereunder-

> ***"Appearance shall be effected by delivering or sending by post to the proper officer a memorandum of appearance in triplicate in Form No. 12 Appendix A with such variation as the circumstances require, signed by the advocate by whom the defendant appears or, if the defendant appears in person, by the defendant or his recognized agent".*** (emphasis added).

27. The respondent instituted the suit before the Trial Court on 29th June, 2017 and he was issued with summons to enter appearance. The respondent averred that the said summons together with the plaint were served upon the appellants on 5th July, 2017. He further averred that

on 18th September, 2017, his Advocates on record received a memorandum of appearance and statement of defence for the appellants filed through the firm of Janet, Jackson & Susan (LLP), who stated that they had been appointed to act for the appellants herein. The said fact was not disputed by the appellants.

28. The lower Court proceedings reveal that the firm of Janet, Jackson & Susan (LLP) actively participated in the proceedings before the Trial Court but failed to attend Court during the hearing of the case, but they were present in Court on the day that judgment was delivered. Pursuant to the provisions of Order 6 Rule 2(1) of the Civil Procedure Rules, 2010, in the absence of notice of change of Advocates and/or a notice to act in person by the appellants herein, the firm of Janet, Jackson & Susan (LLP) was properly on record for the appellants as they had filed a memorandum of appearance on behalf of the appellants.

29. On 30th October, 2017, the matter came up for pre-trial directions and upon the Court noting that there was an affidavit of service on record showing that service was effected on the appellants, it directed the respondent to invite the appellants to fix a hearing date. That through a letter dated 31st October, 2017, the respondent's Advocate invited the appellants to the Registry on 21st November, 2017 to fix a hearing date but the appellants' Advocates did not show up. The respondent then went ahead and fixed the case for hearing on 5th February, 2018.

30. When the case came up for hearing on the said date, the appellants' Advocate informed the Court that the respondent was yet to undergo a second medical examination and the case was taken out and given another hearing date for 19th March, 2018 in the presence of both parties. On the said date, the hearing could not proceed as the Trial Court was not sitting hence the respondent was given another hearing date for 2nd July, 2018. On the said date, the Court noted that there was an affidavit of service on record and directed the case to proceed to hearing after noting that the defence Counsel was duly served with a hearing notice. The respondent's case proceeded for hearing and directions were given for the filing of written submissions.

31. Order 12 Rule 7 of the Civil Procedure Rules, 2010 is the relevant provision under which the Court can set aside the judgment entered herein. It states that-

> ***"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."***

32. In the case of **Duncan Waithaka Ndegwa v Joseph Maina Wangombe** [2013] eKLR, the Court when dealing with a similar issue held that-

> ***"The present Order 12 Rule 7 of the Civil Procedure Rules 2010 under which the present application is made, is akin to order 1XB Rule 8 of the former Civil Procedure Rules. The principles applicable when considering an application under Order 12 Rule 7 of the Civil Procedure Rules were set out in the case of Njagi Kanyunguti alias Karingi Kanyunguti & 4 others vs David Njeru Njogu No. 1818 of 1994 (UR) wherein the Court of Appeal stated at page 4 that:***
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> > ***"In an application brought either under OIXA Rule 10 or OIXB Rule 8 of the Civil Procedure Rules, the court exercises discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The court's discretion is wide, provided it is exercised judicially (see Pithon Waweru Maina v Thuku Mugiria (Civil Appeal No. 27 of 1982) (unreported). Patel v.E.A. Cargo Handling Services Ltd 1974 EA 75). The court is also enjoined to consider all the circumstances of the case, both before and after the judgement being challenged, before coming to a decision whether or not to vacate the judgement.***
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> ***It is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgement in order to avoid injustice, or hardship resulting from accident, inadvertence or excusable mistake or errors and will not assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.*** (emphasis added).

33. As stated under the provisions of Order 12 Rule 7 of the Civil Procedure Rules, discretion is to be exercised so as to avoid injustice or hardship resulting from accident, inadvertence or excusable mistakes and errors. The appellants have not disputed service of the hearing notices. Instead, they have attributed their absence in Court to the mistake of their then Counsel on record. It was contended by Counsel for the appellants that the firm of Janet, Jackson & Susan (LLP) failed to notify the appellants of the hearing date, failed to attend Court on the hearing date and failed to file submissions on behalf of the appellants, which amounts to an excusable mistake visited upon them by their Advocates. As long as a sufficient explanation is given showing good faith, a mistake ought to be excused and a party given an opportunity to be heard on their grievances on merit.

34. In the case of **Shah vs Mbogo** (1979) EA 116, the Court gave guidelines on the exercise of discretion when dealing with applications to set aside judgment as hereunder: -

> ***"I have carefully considered in relation to the present application the principles governing the exercise of the Court's discretion to set aside a judgment obtained exparte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."***

35. It has been held in a multiplicity of cases that the Court must satisfy itself that the applicant has a defence that raises triable issues to warrant the setting aside of an *exparte* judgement. In this case, the appellants through their Advocates Janet, Jackson & Susan (LLP) filed a defence on 7th September, 2017 dated 5th August, 2017. In the said defence, the appellants denied the averments contained in the respondent's plaint and stated that in the event the said accident occurred, the respondent was not lawfully travelling in the suit motor

vehicle. It is trite that a defence on merits does not mean one that must succeed but one that brings forth triable issues. When a defence has merit, it is best left to the Trial Court to test its veracity at the hearing of the case. However, in view of the above I am persuaded that the defence filed on 7th September, 2017 raises triable issues.

36. Having found that the firm of Janet, Jackson & Susan (LLP) was properly on record, it means that the defence filed on 7th September, 2017 on behalf of the appellants was properly on record. Granting leave to the appellants to file another defence shall amount to an abuse of the court process.

37. It has been held that a litigant should not suffer due to the mistakes of their Advocates. However, litigants are also duty bound to follow up on their cases and/or matters to ensure that their Advocates attend Court and prosecute the cases as they should. Section 1B of the Civil Procedure Act which refers to the overriding objective of the Court and gives a further duty to litigants to ensure that their matters are prosecuted without delay and within the minimal judicial resources available. Therefore, the appellants herein had a role to play in the administration of justice by making a follow up from their Counsel and the Court Registry to ensure apt and timely prosecution of the case to assist the Court achieve the overriding objective.

38. A perusal of the Trial Court's proceedings reveals that the law firm representing the appellants, namely, Janet, Jackson & Susan (LLP) was served with hearing notices for 5th February, 2018 and 2nd July, 2018 which is evident from the affidavits of service on record filed on the 5th February, 2018 and 2nd July, 2018, respectively. However, on both occasions, neither the appellants nor their Advocates on record attended Court and/or sent a representative to Court to seek for an adjournment citing reasons as to why they failed to attend Court.

39. Bearing in mind the fact that the application to set aside the *exparte* judgment was brought approximately ten months from the date of the judgment which was delivered by the Trial Court in the presence of the appellants' Advocate, and there being no sworn affidavit from an Advocate from the firm of Janet, Jackson & Susan (LLP) explaining the reasons for their non-attendance in Court as required, this Court finds that the said non-attendance cannot be said to be an excusable mistake or an inadvertent error.

40. The appellants have not attempted to explain the delay in bringing forth the application to set aside the judgment made by the Trial Court despite the fact that they were fully aware of the existence of the said judgment from the day it was delivered on 17th September, 2018.

41. On whether the respondent shall suffer any prejudice in the event that the orders sought by the appellant are granted, the Trial Magistrate in her ruling held that the respondent will be greatly prejudiced since failure by the appellants to satisfy the judgment entered on 17th September, 2018, prompted him to file a declaratory suit against the insurer and as a result, judgment was once again entered in his favour but the same was not satisfied prompting him to instruct Auctioneers to execute the decree against the appellants.

42. In light of the above, it is evident that the decision by the learned Trial Magistrate is based on evidence. I find that there is no proof of misapprehension of the evidence by the Trial Magistrate and/or that she acted on wrong facts or principles of law in reaching her decision.

43. The upshot is that there was no error in principle committed by the lower Court in the exercise of its discretion. In the result, this appeal is devoid of merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 12TH DAY OF NOVEMBER, 2021.

In **view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April, 2020 and subsequent directions, the Judgment herein has been delivered through Teams Online Platform.**

NJOKI MWANGI

JUDGE

IN THE PRESENCE OF-

MR. MWASIA HOLDING BRIEF FOR MR. MUSYOKI FOR THE APPELLANTS

MR. MULI FOR THE RESPONDENT

MR. OLIVER MUSUNDI – COURT ASSISTANT.