



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CIVIL CASE NO. E 16 OF 2021

REUBEN MUSYOKI MULL.....PLAINTIFF/RESPONDENT

-VERSUS-

KENYA COMMERCIAL BANK.....1ST DEFENDANT/APPLICANT

NYALUOYO AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

1. On 28th July, 2021, this Court certified the application date 28th July, 2021 urgent and directed that the same be served for further orders on 12th August, 2021. Pending the said appearance temporary order of injunction were granted. On the return date on 12th August, 2021, Ms Muthini, Learned Counsel for the Plaintiff appeared but there was no representation on the part of the Defendants. Learned Counsel informed the court that despite the Defendants having been duly served, there was no response from them. Accordingly, she asked the Court to grant the same orders pending the hearing and determination of the suit which the Court promptly did and set the matter for pre-trial directions.

2. However, on 23rd August, 2021, the 1st Defendant moved the Court vide a Motion on Notice of the same date seeking the following orders:

- 1) THAT, this application be certified as urgent.**
- 2) THAT, this Honourable Court do set aside its orders issued on 12/8/2021.**
- 3) THAT, the Plaintiff/Applicant's application dated 28/7/2021 which was heard *ex-parte* be heard afresh on merit and in the presence of both parties.**
- 4) THAT the 1st defendant/applicant be granted leave to respond to the application dated 28/7/2021.**
- 5) THAT, costs of this application be in the cause.**

3. The said affidavit was supported by the affidavit sworn by **D.M Muumbi** an Advocate of the High Court of Kenya practicing as such in the firm of B.M Mung'ata & Company Advocates. the 1st Defendant was served with the summons, the plaint and the application dated 28/7/2021 on 2/8/2021 and it instructed the firm of B.M Mung'ata & Company Advocates on 4/8/2021 to defend the application as well as the suit. The deponent stated that he prepared the pleadings but when they attempted to file them they realized that the matter came up for hearing on 12/8/2021 and the application was allowed unopposed.

4. According to learned counsel, the plaintiff did not serve a hearing notice for the application so as to enable the Applicant know when the matter was due in court. It was deposed that this position was confirmed by a perusal of the Court record. It was deposed that the plaintiff relied on the court order as the hearing notice but by an oversight they did not notice that a hearing date had been issued as per the order.

5. It was therefore contended that failure by the advocate for the 1st Defendant/Respondent to attend court was not deliberate but occasioned by failure to serve a hearing notice and an oversight whereby they did not notice the date was stated in the court order. In the deponent's view, failure to attend court by counsel was thus not deliberate at all and a mistake of the advocate should not be visited on the innocent litigant.

6. It was deposed that the 1st Defendant/Respondent has plausible response to the application and the suit including the fact that a different court in Nairobi HCCC No 339/2016 has already held the plaintiff should pay the loan balances and which this court should consider before delivering a ruling. It was disclosed that the plaintiff is in default and the 1st defendant continues to incur losses due to nonpayment by the plaintiff. Therefore, unless the orders sought are granted the Defendant/Respondent will continue suffer irreparably.

7. It was averred that it is in the interest of justice to grant the orders sought as no party shall suffer any prejudice if they are granted.

8. In its submissions, the 1st Defendant reiterated the foregoing and contended that the failure by the advocate for the 1st Defendant/Respondent to attend court was not deliberate and the same should not be visited on the innocent litigant. In light of the decision in Nairobi HCCC No 339/2016, it was submitted that the 1st Defendant/Respondent has weighty issues to raise concerning the conduct of the applicant with respect to the loan facility, previous litigation over the loan facility and other serious points which the court should consider before ruling on the application. That lastly the Plaintiff/Applicant shall suffer no prejudice if the orders sought are granted and it is in the interest of justice to grant the orders sought.

9. It was submitted that Order 12 rules 2 and 7 of the **Civil Procedure Rules** clothes this Court with jurisdiction and/or powers to aside ex-parte proceedings and judgment in order to do justice to all parties. It was further contended that the Court under section 1A, 1B and 3A of the **Civil Procedure Act**, has inherent powers to grant the orders sought to meet the ends of justice while under article 159(2b) of the Constitution the Court should do justice to parties without undue regard to technicalities. Accordingly, regardless of any short comings of the defendants' counsel, the Court is obliged by the rules of Natural Justice and in particular by Article 50 of the Constitution, to hear and determine each case on its merit and that no litigant should be driven from seat of justice without being heard. In support of this submission the Applicant relied on the case of **Kenya Pipeline Company Limited vs. Mafuta Products Limited [2014] eKLR** and while appreciating the fact that settling aside of ex-parte proceedings and orders is the direction of the Court and in so doing, such discretion is unfettered but the same should be exercised judiciously and not capriciously based on the case of **Shah – vs- Mbogo (1967) 166, Prime Bank Limited vs. Paul Otieno Nyamodi [2014] eKLR** and **PMM v. JNW [2020] eKLR**.

10. The Applicant therefore prayed that the Court does allow the application based on **Belinda Muras & 6 Others vs. Amos Wainaina [1978] KLR** and **Phillip Chemwolo & Another –Vs- Augustine Kubede {1982-88} KLR 103**.

Respondent's Case

11. In opposing the application, the Respondent relied on his replying affidavit sworn on 17th September, 2021 in which he averred that the Application and the Court Order served upon the Defendants showed when interparty (sic) hearing was to be conducted. According to him, in those circumstances there was no need of Hearing Notice being served. In this case service of the order was not denied. According to the deponent, the order that was extracted on 29/7/2021 was very clear that the matter was to be mentioned in Court on 12/8/2021 for further Court orders.

12. In the Respondent's view, the Defendants have not given proper reasons for the Court to use its discretion in their favour hence the order for injunction granted by the Court should not be disturbed until the suit is heard and determined.

13. It was submitted that while Order 12 Rule 7 of the **Civil Procedure Rules** gives this Court discretionary powers to set aside or vary the dismissal Order, the discretion should be exercised reasonably, judiciously and on sound legal principles and on terms that are just, since it is an equitable Order. The Plaintiff/Respondent relied on the case of **Patel –vs.- East Africa Cargo Handling Services Ltd (1974) EA 75** and submitted that the key consideration in setting aside Judgment/Order is to avoid injustice or hardship to a party and that the cause for the Applicant's Non-attendance of Court when the matter was coming up for further Orders and when the same was dismissed ought to have resulted from an accident, an excusable mistake or an error. Further the Court is cautioned from setting aside a dismissal Order to assist a party that has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of Justice.

14. In this case it was submitted that the Applicant herein has not shown this Court what injustice/hardship it will suffer if the Orders herein are not issued, since the Respondent is seeking is the Applicants' to keep on hold the scheduled sale by public auction of the Plaintiffs property until the main suit is heard and determined on merit and that the 1st Defendant do give true, proper, full and accurate statements of accounts concerning the loan repayment which to our opinion it is a duty in law that is owed to the 1st Defendant by the Plaintiff to undertake and as such it cannot be termed as an injustice or hardship.

15. On the need to show sufficient cause as to why it did not attend court when the Orders prayed were granted either by showing the same was caused by accident, inadvertence, or excusable mistake or error but not by negligence, inaction or want of bona fides, the Plaintiff relied on **The Registered Trustees of the Archdiocese Of Dar Es Salaam vs. The Chairman Bunju Village Govt. & Otrs. HCCA NO. 147/2006** and submitted that the non-attendance of the Respondents in Court on 12/08/2021 was not an accident, an inadvertence, or an excusable mistake or error on the part of the Respondents but was outright negligence and inaction by the Respondent and the argument advanced by the Respondents that they were not served with a Mention Notice cannot be termed as "sufficient cause" but can only be attributed to Negligence and inaction.

16. It was further contended that the assertion that the Applicant herein should have been served with a Mention Notice even after being properly served with an extracted Order that clearly showed the date fixed for further Orders has absolutely no basis in Law and in this case we can term it as a mere technicality that cannot be used as a basis for setting aside the Orders of this Court as provided by Article 159 (2b) which provides that the Court should do justice to all parties without undue regard to technicalities.

17. In addition, it was submitted that the Court's Record can bear witness that the Respondent's Advocates only came on record in this matter on 18/08/2021 and the memorandum of Appearance served upon on 20/08/2021, all this is long after the Court had made its Orders on 12/08/2021. While submitting that he who comes to equity must come with clean hands, it was contended that the Respondents' Advocates have not approached this Court with clean hands and are quite out of Order in misleading the court

18. It was the Plaintiff's position that the Applicants have not established sufficient cause for the Orders sought to be granted hence the Application dated 23rd August, 2021 should be dismissed with costs to the Plaintiff/Respondent.

Determination

19. I have considered the application herein, the affidavits in support thereof and the submissions made.

20. The application is expressed to be brought, inter alia, under Order 10 Rule 11 and Order 12 rule 7 of the *Civil Procedure Rules*. The former provides that:

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

21. The latter provides 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.

22. Clearly those provision apply where judgement has been entered or the suit dismissed under the respective Orders. In this case what happened was that the Court granted an order of injunction pending the hearing of the suit. Accordingly, the relevant provision should have been Order 51 Rule 15 which provides that:

The court may set aside an order made ex parte.

23. Apart from the issue of costs nothing turns upon that since Order 51 Rule 10(2) of the Rules provide that:

No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

24. In the instant application the applicant seeks this court's exercise of discretion in setting aside the order made due to non-attendance. The issue for determination is whether in the circumstances of this case the Court ought to set aside the *ex parte* order. As was held by the Court of Appeal in CMC Holdings Ltd vs. Nzioki [2004] KLR 173:

“In an application for setting aside *ex parte* judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it would appear was true and not if true, the effect of the same on the *ex parte* judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the *ex parte* judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside *ex parte* judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the 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 draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside *ex parte* judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard *ex parte* and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input.... What the Trial Court should have done when hearing the application to set aside the *ex parte* judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the *ex parte* judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed.”

25. That the decision whether or not to set aside *ex parte* judgement is discretionary is not in doubt. The discretion is intended so to be exercised to avoid injustice and 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 course of justice. See Shah vs. Mbogo & Another [1967] EA 116.

26. In Remco Limited vs. Mistry Jadva Parbat & Co. Ltd. & 2 Others Nairobi (Milimani) HCCC No. 171 of 2001 [2002] 1 EA 233 the

Court set out the principles guiding setting aside *ex parte* judgements as follows:

(i). if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgement is an irregular one, which the Court must set aside *ex debito justitiae* (as a matter of right) on the application by the defendant and such a Judgement is not set-aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself.

(ii). if the default judgement is a regular one, the Court has an unfettered discretion to set aside such judgement and any consequential decree or order upon such terms as are just as ordained by Order 9A rule 10 [now Order 10 Rule 11] of the Civil Procedure Rules.

27. In my view the principles set out above applies *mutatis mutandi* to setting aside orders.

28. That the order being sought to set aside was regular cannot be in doubt. However, in considering whether or not to set aside the default order a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the order, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular order would not usually be set aside unless the court is satisfied that there is a case on the merits, namely a *prima facie* case which merit the reopening of the proceedings in question since the Court, in such circumstances, ought not to act in vain.

29. The overriding guiding principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an *inter partes* hearing, than the judge who acts *ex parte*. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence or objection, there is *prima facie* defence or objection. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the *ex parte* decision. See **Bouchard International (Services) Ltd vs. M'mwereria [1987] KLR 193; Evans vs. Bartlam [1937] 2 All ER 647.**

30. In this case the defendant's failure to appear in court is attributed to the oversight on the part of the Applicant's legal counsel who failed to notice that the return date was contained in the order. The Court however recognises that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. The broad approach is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline and that a defence on merits does not mean a defence, which, must succeed, but one, which discloses *bona fide* triable issue for adjudication at the trial.

31. This case is similar to a case where, for example, counsel fails to diarise or properly diarise the date. In **Kalemera vs. Salaama Estates Ltd [1971] EA 284** a matter that has striking similarities to the present case, the Court expressed itself as follows:

“the failure to attend at the hearing was due to the fact that the applicant's advocate wrongly diarised the date and immediately he became aware of the error he filed the present application. To treat such mistake as an indication of negligence would be to take an extreme view of the circumstances. The court prefers to treat the circumstances as arising out of honest mistake...The test to be applied under section 101 which speaks of “the ends of justice” is wider in its terms and permits a greater discretion. Poverty of the excuse is not the sole matter which must 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 it should always remembered that to deny the subject a hearing should be the last resort of a court.. In this suit, the plaintiff's claim is for damages for wrongful dismissal. The defendant contends that the dismissal was justified under the terms of the written contract between the parties. Clearly, the circumstances require that the defence be heard on its merits. The defendant is here and is anxious to be put in a position to defend. Looking at the matter from the plaintiff's side, the court does not think that he will be prejudiced or suffer hardship if he can be adequately compensated by costs...The circumstances of this case are such that “ends of justice” require that a rehearing should take place. To avoid any misunderstanding about this conclusion, the court has riveted its attention to the circumstances of the error in this particular case, and not attempted to prescribe a general rule for dealing with all errors because there can be errors and errors involving circumstances of infinite variety.”

32. Accordingly, the reason given for the failure to attend the Court on the hearing date is not altogether unheard of.

33. The second issue is whether the Applicant has a **prima facie** arguable objection to the application. The question for the purposes of this kind of application is not whether the objections raised or sought to be raised by the applicants will succeed but whether they are arguable. In other words, the issue cannot, at this stage, be determined to be sham. Yes, the setting aside of a regular order will inevitably lead to some delay but it is my view that the delay that is likely to be occasioned thereby must be weighed against the denial of an opportunity to the defendant to put forward its case on merits. In considering the exercise of discretion, the Court must consider the risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant and having considered that to opt for the lower rather than the higher risk of injustice. This is the principle of proportionality under the overriding objective. That delay, may be compensated by an award of costs. It has been said that seldom, if ever, do you come across an instance where a party has made a mistake in his pleadings which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See **Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.**

34. Having considered the issues raised in this application, I find merit therein. Accordingly, I hereby set aside the orders made on 12th August, 2021 granting the application dated 27th July, 2021 in terms of prayer 3 thereof and order that the said application be heard on merits. The status prevailing before that decision to remain in force. The Costs of this application are however awarded to the Plaintiff/Respondent.

35. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 2ND DAY OF DECEMBER, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mbonzo for the Plaintiff/Respondent

Mr Musya for the 1st Defendant/Applicant

CA Susan