



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 16 OF 2019

ARITHI SELASIO MURUNGI.....APPELLANT

VERSUS

BRIGHT WANJA JULIUS.....RESPONDENT

(Being an appeal from the decision and ruling and order of the Hon. N. Kahara - SRM delivered on 11/4/2019 in Chuka CMCC NO. 159 OF 2016)

JUDGEMENT

1. This is an appeal that arose from the ruling of the trial court in ***Chuka CMCC No.159 of 2016*** which ruling related to an application dated 12th February 2019 which basically sought to set aside an *exparte* judgment entered on 15th November 2018. The *exparte* judgment related to a suit filed by the Respondent against the Appellant which suit was based on a road traffic accident where the Respondent had claimed damages for the injuries sustained reportedly caused by the Appellant's motor vehicle Registration No. KAY 431 F.

2. The records of proceeding from the court below shows that the said suit was filed on 21st December 2016 and on 7th March 2018, the Respondent applied for interlocutory judgment after the Appellant had failed to enter appearance. The trial court entered interlocutory judgment on 12th March 2018 and the suit was set for formal proof on 5th July 2018. The matter appears not to have proceeded on the scheduled date but on 19th July 2018, the matter proceeded and judgment date set for 15th November 2018 when the judgment was delivered and the Respondent awarded **Kshs.3,167,355/-**

3. On 12th February 2019, the Appellant moved the trial court under certificate of urgency vide Notice of Motion dated 12th February 2019 seeking *inter alia* a stay of execution and as observed above setting aside of *exparte* judgment. The grounds upon which the Appellant/Applicant sought to set aside the *exparte* judgment were listed as follows:-

- i) The exparte judgment and decree obtained were irregular and unprocedural.***
- ii) That the Appellant was never served with summons and plaint and was unaware of the existence of the suit.***
- iii) That the Appellant was only notified of the judgment by his insurers.***
- iv) The Appellant wanted an opportunity to be heard.***
- v) That the Appellant had a good defence***
- vi) That the affidavit of service filed was misleading.***

4. The Respondent opposed the said application mainly on grounds that the Appellant had filed a Notice of appointment dated 21st August 2018 and could not therefore claim ignorance of the existence of the suit or interlocutory judgment.

5. The trial court vide its ruling dated 11th April 2019, found no merit in the Appellant's application and noted that Notice of appointment was filed on 25th August 2018 after interlocutory judgment had been entered on 12th March 2018. The trial court reasoned that the defence counsel should have moved the court at the earliest opportunity to set aside the *exparte* judgment but instead slept on his right giving leeway for the Respondent to fix the matter for formal proof on 27th September 2018. The trial court further found that the Appellant should instead blame his counsel for not following up the matter to protect his interests.

6. That ruling as observed above is now the subject of this appeal where the Appellant has listed the following grounds namely:-

- i) That the learned magistrate erred by failing to appreciate that the Appellant met the threshold of setting aside the ex parte judgment.*
- ii) That the learned magistrate failed to exercise her discretion well.*
- iii) That the matter had proceeded ex parte without notice to the defendant.*
- iv) That the learned magistrate erred in finding that the Appellant's counsel and his insurers were aware of suit yet they were not parties in that suit.*
- v) That the learned magistrate erred by failing to consider grounds, facts and authorities cited by the Appellant.*
- vi) That the trial court paid undue regard to technicalities contrary to Article 159(d) of the Constitution of Kenya.*

7. In his written submissions through Ms Mitheka & Kariuki Advocate, the appellant has submitted that trial court has discretionary powers to set aside or vary interlocutory judgment upon terms it may deem just. He has asserted that courts should not impose restrictions on themselves to fetter their own discretions.

8. They further submit that that the governing law on setting aside of ex parte judgment is Order 10 Rule 11 of CPR 2010 which provides that the court has discretionary powers to set aside or vary interlocutory judgment upon terms it may deem as just. They state that courts should not impose restrictions on themselves to fetter their own wide discretion.

They submit that the Appellant was not informed of the suit and only the insurer was, which prejudiced the Appellant. It contends that even if the insurer was informed of the hearing date, the insurer was not a party and the Advocate on record should have been served, if not the defendant himself. He opines that the matter proceeded irregularly without parties being aware. He points out that there is nothing to suggest that the Appellant contributed to the mistake.

9. The Appellant insists that there were irregularities that the trial court overlooked by paying undue regard to technicalities.

10. The Appellant has relied on the following authorities namely;

1. Toshike Construction Company Limited versus Harambee Coop Savings Sacco(2019)eklr. Stephen Wanyee Roki v K-Rep Bank Limited and 2 others (2018)eklr. CoA Nairobi. In this matter, the HC Judge had set aside a default judgment that was in favour of the appellant. The CoA upheld the decision of the HC citing that the Judge considered all relevant factors including presence of delay, active negotiations that halted the matter, multiple applications in the case including change of advocates and raising of triable issues.

2. Abdalla Ali Bajaber v Mangale Dzombo Ngoka and another (2012)eklr HCCC Mombasa. A plaint was filed for specific performance. A statement of defence was filed but an application was made to strike it out for being filed 6 weeks after entry of appearance and for being filed without accompanying documentation as per the CPR 2010. The court observed that the existence of a triable issue is a fact to be considered in an application for striking out a pleading though it does not excuse late filing. The court chose to overlook the defects in the defence case on the principle of substantive justice and that the improper documentation filed by the Advocate should not be blamed on the client. The motion to strike out defence pleadings was dismissed but costs were awarded to the applicant due to the nature of the application being their error.

11. On the other hand the Respondent has opposed this appeal through written submission by counsel Ms Khan & Associates. The main gist of the Respondent's opposition to this appeal is that the Appellant must have been aware of the suit against him and has wondered how else would an advocate file a Notice of Appointment on 25th August 2018 when the matter had already been fixed for formal proof on 27th September 2018. He points out that the Appellant did not serve them with the Notice of Appointment and has faulted him for not applying to set aside the judgment before the matter proceeded to formal proof.

12. The Respondent contends that the Appellant has conceded that his insurers were served and that he failed to summon Ali Hassan Musa, the process server who served summons for purposes of cross-examination.

13. He further contends that they were not under obligation to serve notice of judgment because the Notice of Appointment had not been served on him or his counsel. He insists that the Respondent is a litigant who is deliberately seeking by evasion or otherwise to obstruct and/or delay the course of justice and does not deserve the reliefs sought. He relies on the case of Shah –vs- Mbogo (1967) EA 166 .

14. He has denied the Appellant's claims that the trial court relied on technicalities to dismiss his application to set aside and that the Appellant has not given good reasons why he wants the ruling set aside. In his view the relationship between the Appellant and his insurer is that of agent – principal and the acts of agent (insurer) binds the principle (Appellant). He opines that the appellant should simply pay and thereafter claim from his insurers.

15. He has relied on the following authorities;

1. Blue Shield Insurance Limited v Richard Mwaniki Thuku and another (2002)Eklr. This appeal arose from a refusal by the trial

court to set aside ex parte judgment delivered after absence during hearing. The said judgment was for indemnity by the insurance company. It was said that the appellant's counsel's diary was not diarized due to inadvertence of which the court felt was not a bona fide excuse to warrant exercise of court discretion in favour of the appellant. The court upheld the trial court's decision to dismiss the application to set aside judgment.

2. John Onger Mariara and 2 others v Paul Matundura CoA Kisumu Civil Application 301 of 2003. The applicant sought extension of time to file appeal and a second illegible prayer. The court said that rules of procedure are not meant to assist the indolent and in exercising its discretion, the court must look both ways.

3. Paul Adika Odhiambo and another v Beryl Markel Achieng (minor suing through mother and next friend Scholastica Adhiambo Ogollo) HCCA 20 of 2016. The appellant's application for stay of execution, setting aside of default judgment and leave to file statement of defence out of time had been dismissed. The court was of the view that nothing would have stopped an application to summon a process server and in the absence of that, then the service as sworn was not disproved. The court was also of the view that the failure to even file a draft defence shows lack of good faith and no diligence. The court also stated that the existence of Article 159(d) of the COK 2010 is not a panacea for every blunder, lapse and shortfall. There was double omission by failing to enter appearance and then at the second opportunity to set aside, there was failure to even file a draft defence. The court found the appeal to be unmerited and dismissed it.

16. This court has considered this appeal and the response made by the Appellant. The main issue is basically one which whether the trial court should have set aside the ex parte judgment entered on 12th March 2018. The provisions of order **10 rule 11 of Civil Procedure Rule** provides that a court who has entered judgment under the same order may set aside or vary any such judgment any consequential decree on such terms as it deem just.

17. There is no dispute that the appellant through counsel entered a Notice of the Appointment on 25th August 2018. The Appellant has stated that while his insurers may have been notified of the suit and instructed counsel to enter appearance or file Notice of appointment he was unaware of the suit and he was kept in the dark until final judgment and decree issued. That aspect of Appellant's claim appears to have escaped the attention of the trial court but the Respondent's counsel has put a spirited argument that the insurer and the appellant have a principal – agent relationship and that what comes into the knowledge of the agent is assumed to have passed to the principal and if there was default of relaying the message on time or at all then, the blame should be directed at the agent and not a litigant who took steps to serve them. I have considered the 3 authorities cited by the Respondent and in all of them the courts were not inclined to aid defendants who were indolent or whose advocates committed blunders which were found to be unworthy of any discretion by the courts.

18. In this instance however an interesting issue has been brought out by the Respondent who has conceded that he had a contractual relationship with insurers, but that the insurer was not a party in the suit which I find cogent. This is because though the insurer is liable under contractual terms to cover the appellant and pay in the event of being found liable, the actual party in the suit was the appellant himself. This brings me to what I have observed above which is uncontested fact that the appellant stated that while his insurer was informed, he himself was kept in the dark. The Respondent appears to have effected actual service on the Appellant's insurer. The service on the appellant was contested because while an affidavit of service indicates that the defendant was served at Igoji market, the same is denied by Appellant. I have also noted that the Respondent sent a copy of the notice of interlocutory judgment to the defendant's last known address which pegs the question as to why did he not serve, if the physical address of the appellant was known. I am of the view that the trial court ought to have taken time to interrogate the question of service because of the cardinal rule of natural justice and the constitutional right to be heard.

19. Given the scale or the nature of injuries suffered by the Respondent and the attendant award, this court is persuaded that the scales of justice tilts in favour of the Appellant because he deserves a chance to be heard. I am not persuaded that he should be punished because his agent failed to secure his interests by ensuring that he was notified. While I agree that the insurer in this instance rightfully carries some blame because of instructing counsel to file Notice of Appointment and thereafter going to sleep, I am certain that costs would have been sufficient to address the indolence on the part of the insurer. Otherwise to allow execution to be levied on a party who was unaware of an existence of a suit would be akin to punishing a party for a wrong he had absolutely no role in its commission.

20. The other important question that the trial court should have addressed its mind to is what prejudice would occasion the Respondent if the ex parte judgment was set aside, and the matter allowed to go for full trial at least to ensure that no party feels unfairly excluded from trial. It is quite apparent that the Respondent would not have suffered any prejudice save for costs which as I have noted above could adequately be compensated by an order of costs. The trial court should have interrogated the question of service fully by even summoning on its own motion the process server in order to satisfy itself that the appellant was duly served before condemning him. Courts in my view should exercise some measure of reluctance at closing windows of opportunity for litigants to access to justice unless there is a clear demonstration by a party to derail, obstruct or delay justice. Setting aside an interlocutory judgment being a discretionary matter should lean more to allowing parties access to justice rather impeding them on account of inadvertent mistake like in this instance. There was some inadvertence by Appellant's insurer and the Appellant had no role in that inadvertence. I have looked at the draft defence and it raised important issues fit for trial.

In the end I am inclined to allow this appeal for the aforesaid reasons. The ruling by the trial court dated 11th April 2019 is hereby set aside. In its place, an order is hereby entered allowing the Appellant's application dated 12th February 2019 in terms of prayer 3 thereof. The defendant shall have 7 days from the date of this ruling to file and serve his statement of defence. I also direct that thrown away of costs of **Kshs.10,000/-** (Ten Thousand) shall be paid by the Appellant to the Respondent being costs in the lower court and ten thousand being costs of this appeal. The total amount of **Kshs.20,000/-** shall be paid within **30 days** from today. In default of any of these conditions, judgment shall revert and execution to issue.

Dated, signed and delivered at Chuka this 4th day of March 2020.

R. K. LIMO

JUDGE

4/3/2020

Judgment signed, dated and delivered in presence of Murithi holding brief for Ogweno for Respondent and Njenga holding brief for Mr. Kariuki for

Appellant.

R.K. LIMO

JUDGE

4/3/2020