REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CIVIL APPEAL NO. 5 OF 2019

MOMBASA MAIZE MILLERS NAIROBI LIMITED.....APPELLANT

VERSUS

JOSEPH MWENDO KILONZO.....RESPONDENT

(Being an appeal from the ruling of Hon. J.N. Mwaniki (SPM) in the Senior Principal Magistrate's court at Makueni, civil case No.153 of 2014, delivered on 6th February 2019).

JUDGMENT

1. This appeal is in respect of the ruling dismissing an application (Notice of Motion) dated 20th September 2018. The said ruling was delivered on 6th February, 2019.

2. A brief history of the matter is that the Respondent filed Senior Principal Magistrate's court Makueni Civil Case No. 153 of 2014. The Appellant was served with the plaint and summons to enter appeal but did not enter appearance nor file defence. An interlocutory judgment was entered on 3rd February 2016 and the matter proceeded to formal proof on 11th May 2016.

3. Judgment was delivered on 15th December 2017. An application dated 20th September 2018 sought to have the judgment and all consequential orders set aside. The same was dismissed with costs.

4. Upon dismissal of the said application on 6th February, 2019, the Appellant filed this appeal on the following grounds:

> *i.* ***That,*** *the learned Magistrate erred in law and fact and ended up misdirecting himself in dismissing the application in exercising his discretion in disregard of rules of justice and fairness that no party should be condemned unheard.*
>
> *ii.* ***That,*** *the learned Magistrate erred in law and fact in making a finding that a mistake of an advocate should be visited upon a litigant by invoking principle of vicarious liability.*
>
> *iii.* ***That,*** *the learned Magistrate's ruling was made without considering the annextures to Applicant's affidavit, authorities and submissions before the court and failed to appreciate the nature of application before him and hence ended up causing prejudice to the Appellant.*
>
> *iv.* ***That,*** *the learned Magistrate erred in law and fact by failing to consider the documents before him and to note that the Respondent had no documentary evidence to support his averments.*
>
> *v.* ***That****, the whole ruling was against the weight of evidence before the court and amounted to sabotage of fairness, justice and constitutional rights to a fair trial.*

5. Counsel for the both parties agreed to dispose of the appeal by written submissions, which were filed.

The Appellant's submissions

6. M/s. Muchemi Wangari has submitted that in dismissing the application the trial court failed to consider the averments in the Appellant's supporting affidavit and instead relied on the Respondent's averments. That the Appellant had in its affidavit given cogent reasons showing why it failed to take part in the proceedings.

7. She contends that the authorities submitted by both parties were never considered by the trial court. Quoting heavily from the case of **Philip Keipto Chemwolo & Mumias Sugar Co. Ltd. –vs- Augustine Kubende (1982 – 1988) 1 KAR 1036,** she submits that the learned trial Magistrate failed to exercise discretion by refusing to set aside the exparte judgment when sound reasons had been given by the Appellant. She further argues that the court denied the Appellant an opportunity to be heard and have the case decided on merits.

8. She also referred to the case of **John Peter Kiria & Anor –vs- Pauline Kagwiria Meru HCCA No. 114 of 2009 (2013) eKLR**, to buttress her submissions.

Respondent's submissions

9. M/s. B.M. Mungata for the Respondent submits that setting aside judgments and orders is a matter of discretion and not a right. Referred to is the case of **Simon Thuo Mwangi –vs- Unga Feeds Ltd (2015) eKLR** which the Respondent has heavily relied on. In the said case it was stated as follows:

> ***"Under this provision of law where a judgment has been entered in default of entering appearance or filing a defence or other, the court may set aside that judgment or vary it. but that it may do on terms it considers just. The court is not bound to set the judgment aside. On reasons presented, it takes course to set aside or refuse to set aside. The court thus exercises a judicial discretion all the time having in mind what is just and fair in the case. The reason to set aside must therefore be based on good grounds or reasons advanced not on a whim or caprice."***

10. Still on the **Simon Thuo Mwangi** case counsel submitted that the Appellant's reason for failure to act was that it had given instructions to an advocate who did not act. He wonders why the Appellant did not take any action for **3½** years. He argues that the Appellant did not prove anything before the court to confirm that indeed he had engaged any advocate. That the conduct of the Appellant was quite telling. On this he relied on the cases of **Tana & Athi Rivers Development Authority vs-Jeremiah Kimigho Mwakio & 3 Others (2015) Eklr and Simon Thuo Mwangi** (*supra*).

11. He submits that the trial court was right in dismissing the application since nothing was placed before it to mitigate the Appellant's case. See **Simon Thuo Mwangi case** (supra) where it was held:

> ***"And for all the above, the Appellant did not place before the High Court a reasonable explanation as to why he did not enter appearance or file his defence. So in the end the judge said:***
>
> ***"In my judgment the Applicant's purported explanation in the case is not credible and I reject it."***

12. Counsel submits that the notion that the mistake of counsel should not be visited on the innocent litigant took a new dimension in the case of **Tana & Athi River Development Authority** (supra). He quoted extensively from the said case.

Finally, he submitted that the trial court judiciously exercised its discretion which should be upheld by this court.

Analysis and determination.

13. I have considered the evidence on record, the grounds of appeal, the submissions and the cited authorities. The issue I find falling for determination is whether the learned trial Magistrate exercised his discretion judiciously in dismissing the Appellant's application to have the exparte judgment set aside.

14. The record shows that the suit before the lower court was filed on 3rd December, 2014. There is no dispute that the Appellant was served with the plaint and summons to enter appearance on 25th March 2015 and on 8th December, 2015. The rest of the processes took off upto the point where judgment was delivered on 15th December, 2017.

15. The Appellant was only awakened when execution was levied by Crater View Auctioneers on 18th September, 2018. An application dated 20/09/2018 seeking to set aside the exparte judgment and stay execution was filed on 21/09/2018.

16. The said application was dismissed by the trial court after making the following finding:

> ***"No reasons whatsoever were given by the advocates firm instructed on the failure to file a defence. No reason on which the court could interrogate whether failure was excusable or not. The Defendant seeks not to be made to suffer/pay for the mistakes of his advocate …… In the end the court finds no merit in the said application."***

17. This court is now called upon to find that the learned trial court did not consider the Appellant's averments when making his decision.

18. Order 10 Rule 11 Civil Procedure Rules provides for the setting aside of an exparte judgment. It states as follows:

Setting aside judgment

> ***"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."***

The word used here is “May” which means the exercise is discretionary. Any exercise of discretion must be done judiciously. In the case of **Shah –vs- Mbogo & Anor (1967) E.A 470** the Court of Appeal stated this of exercise of discretion:

> ***“applying the principle that the court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.”***

19. In the exercise of discretion, the court must consider the interests of both parties, and not just one. In this case there is no dispute that the Appellant was served in good time and all the required steps leading to entry of judgment were followed. The judgment was delivered three (3) years after the suit was filed.

20. The Appellant having been served was expected to act. It may be true that an advocate was instructed by the insurance company. It is not the insurance company that was sued. It is the Appellant that was sued and had to act. It was its case and it had to pursue it to ensure that it participated in the proceedings.

21. There was nothing placed before the trial court to show any efforts that were made by the Appellant to have it participate in the proceedings. It is only the threatened execution that woke it up from slumber land for over three (3) years. What is the mistake by the advocate that it is relying on?

22. There is no evidence of the Appellant having checked on the insurer or the advocate for the progress of the case. Had such evidence been availed I would have gladly set aside the ruling. The letter giving instructions alone with no further action does not assist the Appellant, especially when one considers the inordinate delay.

23. The case of **Simon Thuo Mwangi – vs- Unga Feeds Limited (2015) eKLR** speaks very clearly and loudly to the scenario prevailing. I am duly guided by the same.

24. I have had a chance of looking at the draft defence filed with the application that was dismissed. It is a mere denial. At **paragraph 7** of the draft defence the Appellant talks of a deceased person. There was no deceased person involved in this case.

25. The upshot is that the Appellant failed to place before the trial court any material to make it exonerate him from blame for the failure to enter appearance and file defence. I support the finding by the trial court.

26. I find no merit in this appeal which I dismiss with costs.

Orders accordingly.

Delivered, signed & dated this 3rd day of April 2020, in open court at Makueni.

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H. I. Ong’udi

Judge