



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 175 OF 2018

PETER OTIENO OKOTH.....APPELLANT

VERSUS

ERICK NYAKWEBE OCHOTI.....RESPONDENT

(Being an appeal against the Ruling of the Chief Magistrate's Court at Nakuru (Hon. V. Wakhumile) delivered on 01/11/2018 in Nakuru CMCC No. 1198 of 2011)

JUDGMENT

1. The Appellant herein filed a Complaint dated 08/11/2011 sounding in the tort of negligence for personal injuries and economic harms suffered from a road traffic accident which he claimed occurred on 31/12/2010. The reliefs sought were in general and special damages against the Respondent who was named as the Defendant in the suit.

2. Upon service with the Complaint and Summons, the Respondent entered appearance and filed a Statement of Defence through his then advocates, Hari Gakinya & Co. Advocates. The Defence is dated 25/05/2012 and was filed in Court on the same day.

3. From the Court record, the matter was fixed for hearing on several occasions but the Respondent and/or his lawyers did not turn up. It was finally fixed for hearing on 08/12/2016. That date was given in Court by the Learned Trial Magistrate.

4. The advocates for the Appellant, Mboga G.G. & Co. Advocates, facilitated the service of the hearing notice. According to the Court records, an Affidavit of Service was filed on 07/12/2016 by a Mr. George Rasugu. It shows that the hearing notice (which was attached to the Affidavit of Service) was served on the firm of Hari Gakinya & Co. Advocates on 03/10/2016. It bears the "received" stamp of the firm.

5. The record further shows that when the matter was called out for hearing on 08/12/2016, Ms. Moraa was present for the Appellant but that there was no appearance for the Respondent. Upon being informed that the Hearing Notice was served and there were witnesses in Court, the Learned Trial Magistrate proceeded to take the testimony of the Plaintiff. After a brief testimony, the witness was stood down. His testimony eventually proceeded and was concluded on 02/2/2017. Another Affidavit of Service on record shows that the Hearing Notice for this date was served on the firm of Hari Gakinya & Co. Advocates for the Respondent.

6. The Learned Trial Magistrate returned a judgment dated 15/06/2017 awarding the Appellant general damages of Kshs. 500,000/- and Special Damages of Kshs. 21,850/-. An attempt to execute the judgment and decree arising therefrom triggered an Application dated 15/12/2017 by the Respondent. This time, it was filed through a new advocate, Murimi, Ndumia, Mbago & Muchela Advocates. It sought, in the main, the setting aside of the judgment which it described as "ex parte."

7. The Application was opposed by the Appellant – but to no avail. On 01/11/2018, the Learned Trial Magistrate delivered a remarkably short ruling in which "*in the interests of justice and all fairness,[he] set aside the ex parte judgment and all consequential orders.*"

8. To reach that conclusion, the Learned Trial Magistrate gave his reasoning in one paragraph thus:

I have considered the submissions by both parties. Article 25 and 50 of our Constitution place of fair hearing and impartiality at the centre of the exercise of judicial function that can only be achieved when parties to a suit are given an equal chance to ventilate issues that are in contention. Although the hearing proceeded ex parte and a judgment that duly entered (sic), the grounds cited by the Applicant mirror on honesty and not mischief. It is only fair that the Applicant/Defendant is given an opportunity to defend the suit.

9. It is this ruling which is on appeal.

10. The Appellant insists that the ruling of the Learned Trial Magistrate was without basis and applied wrong principles of law because the

Learned Trial Magistrate treated the judgment in the matter as an “ex parte judgment” while, in fact, it was not. The Appellant argues that the suit was, in fact, defended and that there was basis in fact or law to set aside the judgment entered.

11. The Respondent, through its advocates, argues that the judgment in question was an ex parte judgment “for all intents and purposes.” The Respondent submits that it was an ex parte judgment because the Defendant’s counsel was not present during the hearing of the case and that, therefore, the Plaintiff was not cross-examined. The Respondent further argues that he was not in court and was not able to lead evidence.

12. The Respondent argues that in the circumstances of this case, it was open for the Insurer, Pacis Insurance Company, to come on record and defend the suit under section 10 of the Insurance Motor Vehicle (Third Party) Act. The Respondent further argues that the case met the conditions for setting aside enunciated in the celebrated *Pithon Waweru Maina v Thuka Mugiria [1983] eKLR*. He insists that the Learned Trial Magistrate correctly exercised his discretion in setting aside the judgment.

13. The Respondent also argues that the Appellant has impermissibly raised a new matter on appeal. The new matter, Gakinya & Co. Advocates had already filed a Statement of Defence in the matter. The Respondent argues that the Appellant did not raise this matter during the hearing of the application to set aside the judgment and that he cannot raise it now. The Respondent relies on *Openda v Ahn* and *Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR* for this proposition.

14. I will deal with this matter first. It is, of course, true that, absent a narrow set of exceptions, it would be improper for a party to raise a matter for the first time on appeal. However, this protestation is inapplicable in this case. The facts of this case are that the Appellant brought an action in the Trial Court. The Respondent instructed a firm of advocates to file a Statement of Defence on his behalf. The said firm duly filed the Statement of Defence and was served with all subsequent court process thereafter.

15. After entry of judgment, a new firm of advocates, this time ostensibly instructed by the Respondent’s insurers brought an application to set aside the judgment entered. That application was contested and a ruling given which was adverse to the Appellant. In giving that ruling, it was incumbent upon the Learned Trial Magistrate to familiarize himself with the entire file to determine if it was appropriate to exercise his discretion to set aside the judgment. It cannot be correct to say that the Learned Trial Magistrate only considered the factual issues raised by the parties before him when the question whether there was a defence on record or not was a matter of Court record. It would be absurd to hold that a matter of Court record as obvious as whether a suit is defended by the filing of a Defence and whether affidavits of service are on record showing the party was served cannot be raised on appeal because it amounts to “raising a new ground on appeal.” It was incumbent on the Respondent’s new advocates to peruse the Court file to familiarize themselves with the actual position of the file as it was for the Learned Trial Magistrate before writing his ruling.

16. I will now turn to the substantive issue on appeal. As the Appellant’s advocates have alluded, the Learned Magistrate’s ruling setting aside the judgment is remarkable in several ways. First, the Learned Trial Magistrate in describing the judgment of 15/06/2017 which he wrote, he elides the fact that the judgment was written after a hearing in which the Respondent and/or his lawyer had failed to turn up for the hearing after being duly served with a hearing notice. Second, the ruling does not anywhere evince the fact that what was in contention was not judgment entered in default of appearance – but a judgment entered after the Respondent had entered appearance, filed a defence and then the Respondent failed to show up for the hearing. Hence, the principles used by the Learned Trial Magistrate as well as the factual predicate of the ruling dated 01/11/2018 are, to say the least, erroneous.

17. The Respondent’s advocates based their entire application on alleged “confusion” in the legal office of the Respondent’s insurers who, they claim, had failed to defend the suit inadvertently. They begged for an opportunity to defend the suit and even attached a Draft Statement of Defence (which they eventually filed). In truth, however, the suit had been “defended.” A Statement of Defence was filed. Therefore, the analysis used by the Learned Trial Magistrate and the conclusion reached was entirely wrong.

18. In the Application before the Learned Trial Magistrate, there was no explanation why the Respondent had failed to attend Court. Indeed, there was not even a Notice of Change of Advocates from Hari Gakinya & Co. Advocates to the current advocates on record. The Respondent simply ignored everything that had happened before judgment was entered after he failed to show up for the hearing and now purported to file a new Statement of Defence.

19. The long and short of it all is that the analysis undertaken by the Learned Trial Magistrate was entirely irregular. It was not based on an accurate appraisal of the record and it, therefore, applied wrong principles and arrived at an erroneous conclusion. It is ripe for reversal and setting aside which I hereby do. This is not a “technicality” as the Respondent’s counsel argues. The question at hand was whether a judgment enjoyed by the Appellant after a hearing in which there was evidence of service of hearing notices should be set aside or not. This was not a judgment entered in default of appearance. It was a judgment entered after the suit was defended and several hearing dates set and notices served. It was a judgment given after a hearing on a date set by the Court.

20. It would be definitionally prejudicial to set aside such a judgment without sufficient reason. Wrong reasons given for the setting aside of a judgment as was given here cannot be sufficient reasons for setting aside the judgment. The application of wrong principles in the setting aside of a judgment cannot be sufficient reasons either. A judgment set aside after a near complete misapprehension of the court record cannot be said to have been set aside for sufficient reason.

21. The result is that this Appeal succeeds in its entirety. The Orders given by the Learned Trial Magistrate on 01/11/2018 are hereby set aside in their entirety. The Appellant is also awarded the costs of this appeal.

22. Orders accordingly.

Dated and delivered at Nairobi this 4th day of June, 2020.

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JOEL NGUGI

JUDGE

NOTE: This ruling was delivered by both Zoom video-conference facility and email pursuant to the various Directives by the Honourable Chief Justice urging Courts to consider use of technology to deliver judgments and rulings where expedient due to the COVID-19 Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by email in cases where all the parties have consented to dispense with the requirements of Order 21 Rule 1 of the Civil Procedure Rules. In this case, both the Counsel for the Appellants, Mboga GG & Co. Advocates and Counsel for the Respondents, Murimi, Ndumia, Mbago & Muchela Advocates, consented to the delivery of the ruling by both email and video-conference facility.