



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 296 OF 2017

DIAMOND SYSTEMS LIMITEDAPPELLANT

-VERSUS-

JOSATRONIC DATA SYSTEMS LIMITED.....RESPONDENT

(Being an appeal from the ruling of Hon. M. Obura (Mrs) SPM in the Chief Magistrate's Court at Milimani delivered on 31st May 2017 in CMCC No. 6423 of 2016)

JUDGEMENT

- 1) Josatronic Data Systems Ltd, the respondent herein, filed an action against Diamond Systems Ltd, the appellant herein, before the Chief Magistrate's Court seeking to be paid a sum of kshs.819,324 plus bank charges amounting to ksh.8,250/=.
- 2) The appellant entered appearance but did not file a defence. A default judgment was entered in favour of the respondent and against the appellant on 10th January 2017 on the respondent's advocate's request. The appellant took out the motion dated 16th January 2017 in which it sought for inter alia the default judgment to be set aside and to be allowed to defend the suit.
- 3) The respondent filed a replying affidavit to oppose the motion.

Hon. A. M Obura (Mrs.), the learned Senior Principal Magistrate heard the application and had it dismissed.

4) The appellant being aggrieved preferred this appeal and put forward the following grounds:

- i. The learned magistrate (Honourable M. Obura (Mrs.), SPM) wrongly interpreted and applied the provisions of Article 22(3) (d) and 159 (2) (d) of the Constitution of Kenya, 2010 as read together with Article 50 of the Constitution of Kenya, 2010.*
- ii. The learned magistrate (Honourable M. Obura (Mrs.), SPM) failed, refused and or ignored to determine the issues raised in the appellants' Notice of Motion Application dated 16th January 2017 relating to setting aside of an ex-parte interlocutory judgment entered against the appellant on 10th January 2017 without analyzing the evidence as presented by the appellant.*
- iii. The learned magistrate (Honourable M. Obura (Mrs.), SPM) erred in law in holding that the defence as raised by the appellant does not raise triable issues, lacks merit and is a sham and failed to evaluate the same on pretext that it was contradictory evidence that could not be arguable thus denying the appellant the right to be heard.*
- iv. The learned magistrate (Honourable M. Obura (Mrs.), SPM) patently breached the appellants' inviolable right enshrined in article 50(1) of the Constitution of Kenya as read together with Article 25(c) thereof to have a dispute that can be resolved by the application of law decided in a fair hearing before a court.*
- v. The learned magistrate (Honourable M. Obura (Mrs.), SPM) exceeded the scope of his jurisdiction pursuant to the provisions of Article 169(1) and (2) of the Constitution of Kenya, when the learned magistrate of the Chief Magistrate's Court in Nairobi, Milimani Commercial Courts made various conclusions of fact not supported by any legal reasoning founded in the Constitution of Kenya and any other law in force in Kenya.*
- vi. The learned magistrate (Honourable M. Obura (Mrs.), SPM) grossly erred in law and in fact by deviating from principles of the incidence of burden and standard of proof in patent breach of the provisions of Article 163(7) of the Constitution of Kenya.*
- vii. The learned magistrate (Honourable M. Obura (Mrs.), SPM) erred in law by not considering matters of fact and evidence that were essential to his jurisdiction and as such contrary to the provisions of Article 50(1) of the Constitution of Kenya.*

5) When this appeal came up for hearing, this court gave directions to have the same disposed of by written submissions. I have re-evaluated the arguments made before the trial court. I have also taken into account the rival written submissions. Though the appellant put forward a total of 7 grounds of appeal, the main ground which commends itself for determination is whether the learned Senior Principal Magistrate applied the principles necessary in determining an application for setting aside *ex parte* judgements.

6) In the case of **Python Waweru Maina =vs= Mugira (1983) eKLR**, the Court of Appeal set out the principles to be considered in determining an application to set aside *ex parte* judgment *inter alia* as follows:

“Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgement he does so such terms as may be just.....

The main concern of the courts is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.

Patel =vs= Cargo Handling Services Ltd (1974) E.A 75 and 76C and E(b). Secondly, 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 the person who had deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah =vs= Mbogo E.A 116 at 123B, Shabir Din =vs= Ram Paikash Anand (1955) 22 EACA 48C”

7) The learned Senior Principal Magistrate, considered the material placed before her and the submissions of the parties and came to the following conclusions.

8) First, that since the defendant (appellant) concedes that it was served with the summons to enter appearance, it follows that the default judgment was regular and valid and cannot be set aside.

9) Secondly, that there is no proof that the appellant’s Managing Director was out of the country.

10) Thirdly, that it is likely that there was a breakdown of communication between the defendant (appellant) and its advocate. However, this case belongs to the defendant and not its advocates. They should have exercised diligence.

11) Fourthly, that the defence is contradictory, hence it is a sham and does not raise triable issues and is a deliberate attempt to evade the course of justice.

12) On appeal, the appellant argued that the learned Senior Principal Magistrate erred when she failed, refused and or ignored to determine the issues raised in the appellant’s application relating to the setting aside of the *ex parte* judgment.

13) It was pointed out that the trial magistrate failed to analyse the evidence presented by the appellant. The appellant further argued that the trial magistrate erred when she concluded that the draft defence raised no triable issues.

14) The respondent is of the opinion that the trial magistrate considered the relevant principles before dismissing the appellant’s application. According to the respondent, the appellant’s draft defence raised no triable issues but contained mere denials. It was also submitted by the respondent that the appellant tendered no evidence to prove that its Managing Director was out of the country nor did it show that it had disagreements with its erstwhile advocate.

15) It is the respondent’s submission that the trial magistrate properly exercised her discretion in disallowing the application for setting aside *ex parte* judgment.

16) Having re-evaluated the arguments made before the trial court and having considered the rival written submissions, there is no dispute that the appellant failed to file a defence within the time prescribed by law hence a default judgment was entered. The question is whether the learned Senior Principal Magistrate properly and judiciously dismissed the appellant’s motion dated 16th January 2017. In the aforesaid motion, the appellant expressly stated that its failure to file a defence in time was due to a breakdown of communication between it and its erstwhile advocate since its Managing Director had travelled out of the country without informing the advocate.

17) The appellant further stated that its former advocate was not also keen on acting in the matter hence the delay in filing the defence. The record shows that the appellant pleaded not to be punished for the mistakes of its advocate. The appellant further stated that it had a serious defence with arguable issues and annexed a copy of the draft defence to the affidavit of its Managing Director, Lazarus Njagi Migua.

18) In the draft defence the appellant admitted that it issued the cheques but subsequently stopped their payment after discovering inconsistencies and defects in the goods and invoices raised. The appellant stated that it later reissued other cheques thus settling the outstanding amount in excess of ksh.802,388/=.

19) The respondent argued before the trial court that the draft defence was a sham and was meant to delay the conclusion of the matter. The respondent pointed out that there were particulars of inconsistencies on defects shown.

20) It was pointed out that the cheques purportedly issued by the appellant were meant to settle other debts but not the outstanding debt claimed in the suit. Faced with the above arguments, the learned Senior Principal Magistrate came to the conclusion I earlier outlined in this judgment.

21) The trial magistrate concluded that there was no evidence that the appellant's Managing Director was out of the country. In paragraph 5 of the supporting affidavit of Lazarus Njagi sworn on 16.1.2017 and filed in support of the motion dated 16th January 2017 the deponent expressly states inter alia as follows:

“That the delay to file the defence in time was occasioned by a breakdown of communication between my advocates on record and I had travelled out of the country on business and I had not informed them on the same.....”

22) A careful perusal of the replying affidavit of Josphat Maina Gichuki sworn on 1st March 2017 in response to the supporting affidavit will reveal that the factual averment was not answered no controverted. The learned Senior Principal Magistrate therefore erred when she stated that there was no evidence to show that Lazarus Njagi had travelled out of the country and yet the averment had not been controverted. There was no other evidence to show that the averment was false.

23) The trial magistrate appear to agree with the appellant that it had some disagreement with its advocates. She however concluded that the appellant should have been vigilant. With respect, the trial magistrate fell into error because she failed to appreciate the argument that the appellant's erstwhile advocate may have intentionally failed to file the appellant's defence because of the apparent disagreements between them.

24) The other important conclusion reached by the trial magistrate is that the defence is a sham. I have carefully looked at the draft defence. It is apparent that the same raises triable issues. One of the triable issues which apparent is whether the cheques issued by the appellant and cleared for payment were in respect of the debt in the suit or were they in respect of other debts.

25) It is clear from the submissions of both parties that the parties to this appeal and the suit had other transactions apart from what now is before this court. The other triable issue which is apparent is whether or not the goods delivered had defects and whether the invoices issued were inconsistent. I am therefore convinced that the learned Senior Principal Magistrate fell into error in concluding that the defence was a sham.

26) It is trite law that a party should not be allowed to suffer for the mistakes of its advocate. It is also trite law that where a party has put forward a defence with triable issues, like in this case, such a party should be given a chance to defend the suit and the party which has secured a default judgement can be compensated by an award of costs. The appellant had given good reasons as to why it did not file a defence within the time prescribed by law hence it should have accommodated by the trial court.

27) In the end, I find this appeal to be meritorious hence it is allowed. Consequently, the order dismissing the motion dated 16.1.2017 is set aside and is substituted with an order allowing the aforesaid motion giving rise to the following orders and directions:

- i. The exparte judgment entered on 10th January 2017 is set aside.**
- ii. The defendant(appellant) is given leave to file its defence within 15 days from the date hereof.**
- iii. The plaintiff (respondent) to have costs of the motion dated 16.1.2017.**
- iv. Each party to meet its own costs on appeal.**
- v. The suit to be heard on priority basis by any other competent magistrate other than Hon. A. M. Obura.**

Dated, signed and delivered online via Microsoft Teams at Nairobi this 17th day of July, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent