REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 364 OF 2019

NIC BANK LIMITED……...……..…….APPELLANT

VERSUS

OBAE JOHN KEBASO……RESPONDENT

(Being an appeal against the ruling and order of Honourable I. Orenge (Mr.) (Senior Resident Magistrate) delivered on 29th May, 2019 in MILIMANI CMCC No. 1598 of 2016)

JUDGEMENT

1. At the onset, the respondent herein instituted a suit before the Chief Magistrate's Court by way of the plaint dated 17th March, 2016 and sought for reliefs against the appellant in the nature of a permanent injunction restraining the appellant and/or its servants/agents from dealing with, interfering with or otherwise disposing of motor vehicle registration number KBQ 590U Isuzu NKR Lorry ("the subject vehicle"); a declaration that the repossession of the subject vehicle is illegal and unlawful; costs of the suit and interest thereon.

2. The respondent averred in his plaint that he had at all material times entered into a hire purchase agreement with the appellant in which the appellant was to finance the purchase of the subject vehicle and that the facility was to be repaid within a period of 48 months with effect from October, 2011.

3. The respondent pleaded in his plaint that despite diligently repaying the loan facility, the appellant has threatened to repossess the subject vehicle unless and until the respondent pays the non-existent arrears in the sum of Kshs.513,781.1.

4. Subsequently, upon the request of the respondent, an ex parte judgment was entered against the appellant on 30th August, 2017 and the matter proceeded for formal proof hearing. In the end, judgment was entered as prayed in the plaint by the trial court on 3rd December, 2018.

5. Consequently, the appellant filed the application dated 7th February, 2019 seeking to set aside the ex parte judgment. The

application was opposed by the respondent.

6. Upon hearing the parties on the application, the trial court dismissed the application with costs vide its ruling delivered on 29th May, 2019.

7. Being aggrieved by the aforementioned ruling, the appellant sought to challenge the same by way of an appeal. Through its memorandum of appeal dated 26th June, 2019 the appellant put in the following grounds:

> ***i. THAT the learned trial magistrate erred in law and in fact in holding that the appellant was served with summons to enter appearance.***
>
> ***ii. THAT the learned trial magistrate erred in law and in fact in failing to set aside the ex parte judgment entered on 30th August, 2017 and the consequential orders thereto.***
>
> ***iii. THAT the learned trial magistrate erred in law and in fact in finding that the appellant had no plausible reason and explanation as to why it did not file its defence within time.***
>
> ***iv. THAT the learned trial magistrate erred in law and in fact in disregarding the fact that the delay in filing the application dated 7th February, 2019 was as a result of irregular disappearance of the court file and failure by the registry to reconstruct the file upon request of the appellant.***

v. THAT the learned trial magistrate erred in law and in fact in finding that the appellant never wrote to the Executive Officer to report that the file was missing from the registry yet there was evidence on record demonstrating the same.

vi. THAT the learned trial magistrate misdirected himself in entering the ex parte judgment contrary to the express provisions of Order 10, Rule 6 of the Civil Procedure Rules.

vii. THAT the learned trial magistrate erred in law and in fact in failing to consider that the appellant's draft defence and counterclaim raised triable issues.

viii. THAT the learned trial magistrate erred in law and in fact in finding that the appellant had not met any conditions laid for consideration by the court before granting the orders prayed.

ix. THAT the learned trial magistrate erred in law and in fact in disregarding the appellant's evidence in the application dated 7th February, 2019 and its written submissions thereto.

x. THAT the learned trial magistrate misdirected himself in holding that the objective of the appellant's application was to hinder the conclusion of the matter yet the appellant, unaware of the ex parte judgment already on record, had on 26th February, 2018 filed an application dated 22nd February, 2018 seeking to dismiss the suit for want of prosecution.

xi. THAT the learned trial magistrate misdirected himself on the facts and the law by basing his findings on irrelevant considerations and exercised his discretion capriciously and/or improperly.

xii. THAT the learned trial magistrate erred in law and in fact by holding that the appellant's application dated 7th February, 2019 seeking to set aside the ex parte judgment lacked merit. In the circumstances, the ruling of the learned trial magistrate is a miscarriage of justice.

8. This court gave directions to the parties to file written submissions on the appeal. The appellant vide its submissions dated 4th August, 2020 argued that the interlocutory judgment entered is irregular *ab initio* for the reason that the same was sought by the respondent under the provisions of Order 10, Rule 6 of the Civil Procedure Rules which concern a claim for pecuniary damages and yet the claim by the respondent was not pecuniary in nature.

9. The appellant further argued that in the circumstances, this court has discretion to set aside the ex parte judgment. The appellant has cited the case of **Shah v Mbogo & Another [1967] EA 116 at 123 BC** where the court held that the discretion to set aside an ex parte judgment ought to be exercised in such a manner as to avoid an injustice or hardship resulting from an excusable mistake, but is not intended to assist a party who has deliberately sought to obstruct or delay justice.

10. It is the submission of the appellant that the trial court erred in allowing the respondent to proceed with the formal proof hearing in the absence of a proper and regular judgment in place.

11. It is also the submission of the appellant that the interlocutory judgment was founded on a misrepresentation of facts since in the present instance, the appellant had not entered appearance but had instead filed a notice of appointment of advocates, and yet the respondent through his request for judgment, indicated that the appellant had entered appearance but not filed a statement of defence. To buttress its argument above, the appellant made reference to the case of **Flora Delight Limited v Rose Ikarie Emurutu [2017] eKLR** in which the court rendered itself thus:

"Meanwhile, on 03/08/2015, the Respondent's Advocates requested for an interlocutory judgment under Order 10 Rules 6, 9 and 10. In their request they allege that the "Defendant …has been served and entered appearance but failed to file the Defence."

Suffice it to say that this request was irregular because it purported that the Appellant had entered appearance and failed to timeously file a Defence. However, the Appellant had not entered appearance at that point: all it had done was to cause its Advocates to file a Notice of Appointment of Advocates. Therefore, to this extent, the Request for Interlocutory Judgment was based on a misrepresentation… Where does that leave us? We have established that the request for, and entry of interlocutory judgment at the behest of the Respondent was improper and irregular. It was improper and irregular – both because it misrepresented that there was an entry of appearance and a failure to file a defence as well as the fact that, technically, there was no proper service on the corporation until 22/07/2015."

12. The appellant further argued that its draft statement of defence and counterclaim raises triable issues which ought to be ventilated at the trial, including the indebtedness of the respondent. The appellant cited the case of **Abdalla Mohamed & another v Mbaraka Shoka [1990] eKLR** in which the Court of Appeal expressed itself in part as follows**:**

"…the tests for the correct approach in an application to set aside a default judgment are; firstly whether there was a defence on merits; secondly, whether there would be any prejudice; and thirdly, what is the explanation for any delay…"

13. The appellant contends that the trial court similarly erred in finding that it had not given any plausible explanation for the delay in bringing the application and yet the same had clearly been laid out therein.

14. The appellant is also of the view that no prejudice will befall the respondent if the ex parte judgment is set aside and the appellant is granted leave to file its statement of defence and counterclaim.

15. In response, the respondent vide his submissions dated 15th September, 2020 submits that the ex parte judgment is regular since the appellant's advocate filed both a notice of appointment of advocates and a memorandum of appearance on separate dates.

16. The respondent further submits that the appellant did not give good reasons as to why the ex parte judgment should be set aside and that its draft statement of defence and counterclaim does not raise any triable issues but consists of mere denials and is intended to prevent the respondent from enjoying the fruits of his judgment.

17. On the subject of prejudice, it is the contention of the respondent that he has been and continues to be prejudiced since he was listed with the Credit Reference Bureau (CRB) and the appellant has not taken any steps to have him delisted.

18. The respondent went on to submit that the appellant has not released the logbook to the subject vehicle and he cannot therefore renew the insurance cover to the said vehicle.

19. For all the foregoing reasons, it is the view of the respondent that the appeal must fail.

20. I have considered the contending submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the trial court. It is clear that the appeal fundamentally lies against the trial court's decision to dismiss the appellant's application seeking to set aside the ex parte judgment. I will therefore deal with the grounds of appeal contemporaneously under the following limbs.

21. The *first* limb of appeal touches on whether the appellant provided sufficient reasons for the delay in bringing the Notice of Motion dated 7th February, 2017 ("the Motion") before the trial court.

22. In the grounds to its Motion, the appellant explained that the delay in filing the Motion was caused by the fact that the court file went missing from the registry since the time it was last in court on 17th May, 2018.

23. In her affidavit in support of the Motion, advocate Vivienne Eyase averred that the respondent filed an application together with the suit and sought for temporary injunctive orders, which orders were granted by the lower court vide the ruling delivered on 7th December, 2016.

24. The deponent averred that since then, the respondent did not take any further steps to prosecute his case, causing the appellant to file the application dated 22nd February, 2018 seeking the dismissal of the suit for want of prosecution.

25. It was the assertion of the deponent that thereafter on 11th April, 2018 she came across the suit on the daily cause list and noted that it had been listed for hearing of the main suit even before the application for dismissal had been heard and determined. On attending court on the aforementioned date, she learnt that the ex parte judgment had been entered against the appellant on 30th August, 2017.

26. It was also the assertion of the deponent that the parties tried in vain to settle the matter out of court and that subsequently, the court file went missing and the appellant's advocate followed up on the same with the Executive Officer, to the extent of filing an application for reconstruction of the court file.

27. In his replying affidavit, the respondent confirmed the existence of the application for dismissal of the suit and the attempts by the parties to arrive at a settlement to no avail. However, the respondent denied the averment that the court file ever went missing from the registry.

28. In his ruling, the learned trial magistrate reasoned that there is no evidence to show that the appellant wrote to the Executive Officer regarding the missing file.

29. Upon a carful perusal of the pleadings and record, there is the matter was last in court on 17th May, 2018 the court file has been untraceable and hence it is unable to file an application seeking to set aside the ex parte judgment. There is nothing to indicate that this correspondence elicited a response.

30. It is also apparent from the record that the appellant's advocate drafted the application dated 15th October, 2018 seeking an order for reconstruction of the court file. It is not clear when this application was filed in court or whether it was ever heard.

31. Needless to say that on the face of the record, there is nothing to show that the court file was ever missing. In fact, the record shows that on 17th May, 2018 being the date on which the appellant claims the matter was last in court, the suit was fixed for ex parte hearing on 22nd August, 2018 and that the hearing proceeded on the latter date.

32. From the foregoing, I concur with the reasoning of the learned trial magistrate that there is no credible evidence to show that the court file went missing and I am of the view that no sufficient reasons have been given to explain the delay in bringing the application for setting aside the ex parte judgment.

33. The *second* limb of appeal concerns itself with whether the ex parte judgment entered on 30th August, 2017 in place is regular.

34. In its Motion, the appellant averred that the ex parte judgment is irregular for the reasons that it was not served with summons to enter appearance; it has a strong and arguable defence; the respondent does not stand to suffer any prejudice; and that denying it the opportunity to defend the suit ought to be a matter of last resort.

35. In reply, the respondent stated that summons were taken out and served upon the appellant but that the appellant failed to file its statement of defence.

36. The respondent further stated that upon his request, the ex parte judgment was entered on 30th August, 2017 and the matter proceeded for formal proof, following which final judgment was delivered on 3rd December, 2018.

37. The respondent averred that the draft statement of defence and counterclaim does not disclose any triable issues and consists of mere denials.

38. Upon hearing the parties on the Motion, the learned trial magistrate analyzed that service was effected upon the appellant and found that the appellant had not satisfied the conditions to warrant a granting of the orders sought in the Motion.

39. As earlier noted, it is not in dispute that the suit was brought together with an application seeking temporary injunctive orders. The record shows that the appellant subsequently filed a notice of appointment of advocates on 29th March, 2016 and put in a reply to the aforesaid application.

40. The record also shows that summons were issued to the respondent and thereafter served upon the appellant through its Legal Services Department on 21st June, 2017. It is not controverted that the appellant did not file its statement of defence within the stipulated timelines.

41. Upon perusal of the request for judgment dated 24th July, 2017 and received by the lower court on 25th August, 2017 there is nothing to indicate that the same was sought on a liquidated claim. From my reading of the request for judgment, it is clear that the same was sought on the basis that the appellant; despite having entered appearance; did not file its statement of defence in the manner required by law.

42. From the foregoing, I established and therefore concur with the reasoning of the learned trial magistrate that summons to enter appearance were taken out and properly served.

43. This brings me to the issue on whether the appellant's draft statement of defence and counterclaim raises triable issues.

44. In determining whether or not to set aside an ex parte/default judgment, a court is required to consider whether a party has a triable defence even where service of summons is found to be proper. In so saying, I cite with approval the rendition in the case of **Tree Shade Motors Ltd v D.T. Dobie & Another (1995-1998) IEA 324** relied upon in **M/S Jondu Enterprises Limited v Spectre International [2019] eKLR** thus:

> ***"Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside."***

45. From my study of the appellant's draft pleadings, I observed that while admitting to the existence of the agreement entered into between the parties herein and in respect to the subject vehicle, the appellant pleaded in its counterclaim that the respondent breached the agreement by defaulting on repayment the loan amount and is therefore indebted to the appellant in the sum of Kshs.503,749.07 which accrues default interest at the rate of 30% p.a.

46. In my view, the foregoing consist of triable issues which can only be adequately ventilated at the hearing of the suit. I note that the learned trial magistrate did not address his mind to the subject of the draft statement of defence and counterclaim annexed to the Motion.

47. The third condition for consideration in setting aside a default judgment such as the one in the present instance has to do with whether the respondent stands to be prejudiced. I equally note that the learned trial magistrate did not delve into this subject in his analysis.

48. The respondent restated the position on appeal that he has been listed with CRB as a loan defaulter and cannot therefore apply for loans. However, from my study of the record I observed that he did not place any credible evidence before the trial court to support this averment or to show that the prejudice is so irreparable as to constitute a grave injustice to him.

49. Upon taking into account all the foregoing factors hereinabove, I am convinced that it would be a proper exercise of my discretion to interfere with the impugned ruling and to grant the appellant the opportunity of defending the claim.

50. In the end, the appeal is found to be meritorious hence it is allowed. Consequently, the following orders are granted:

> **a) The ruling delivered on 29th May, 2019 is hereby set aside and is substituted with an order allowing the Motion dated 7th February, 2019.**
>
> **b) The ex parte/default judgment entered on 30th August, 2017 and all consequential orders/proceedings are hereby set aside.**
>
> **c) The appellant is granted leave to file and serve its statement of defence and counterclaim within 14 days from today.**
>
> **c) Costs of the Motion dated 7th February, 2019 to abide by the outcome of the suit.**

d) In the circumstances of this appeal, a fair order on costs is to order which I here do that each party bears its own costs.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 6th day of November, 2020.

……..…….

J. K. SERGON

JUDGE

In the presence of:

…….... for the Appellant

…….... for the Respondent