REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 36 OF 2018

TSUSHO CAPITAL KENYA LIMITED.....APPELLANT

VERSUS

ANTONY MBUTHIA KIBURI (Suing as the Legal Respective and Administrator of the Estate of the late

ELIUD MWANGI MBUTHIA (deceased).....1ST RESPONDENT

MINISTRY OF INTERIOR SECURITY & CO-ORDINATION OF

NATIONAL GOVERNMENT.....2ND RESPONDENT

(Being an Appeal from the decision of the Principal Magistrate at Embu

(Hon. S.K Mutai) in Embu CMCC No. 218 of 2017 made on 10th July 2018).

J U D G M E N T

A. Introduction

1. The appeal subject of this judgment is against the ruling of the trial court (Hon. S.K Mutai) in Embu CMCC 218 of 2017 wherein the trial court dismissed the appellant's application dated 3/04/2018 and which sought for the orders for setting aside of the ex-parte judgment dated the 20/03/2018 and leave to file defence and have the matter heard on merit. The appeal was instituted vide a memorandum of appeal dated 25/07/2018, setting out the four (4) grounds and which I will summarize as herein below: -

> *1) That the learned magistrate erred in fact by finding that the Appellant ignored the summons to enter appearance whereas the evidence was that there was inadvertent mistake on the part of the appellant's insurer in delaying to appoint an advocate to defend the appellant*
>
> *2) That the learned trial magistrate erred in law and fact by failing to find that the appellant had a constitutional right to a fair hearing and to have its case heard on merit by failing to set aside ex-parte judgment despite explanations having been given by the appellant as to the failure to file appearance and defence.*
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> *3) That the learned trial magistrate erred in law and fact by failing to consider that the appellant had demonstrated that it had good defense and thus exercised his discretion wrongly.*
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> *4) That the learned trial magistrate erred in law and fact by failing to consider that the judgment was irregularly entered as there was no evidence of service availed in court and thus the entire judgment was defective.*

2. The appellant thus prayed that the appeal be allowed and the orders made on 10/07/2018 be set aside. Further it was prayed that the said application be allowed in terms of prayer 3 and 4, the costs of the appeal and the costs of the application.

3. At the hearing of the appeal, the parties took directions to have the same canvassed by way of written submissions.

B. Submission by the parties

4. The appellant, in support of the appeal, submitted that the summons to enter appearance were never ignored but that it forwarded the summons to its insurer who delayed in appointing an advocate to defend the matter. The Appellant relied on **Ima Hauliers Limited –vs- Phillip Ong'atoAtako [2011] eKLR.** It was further submitted that the appellant had a good defense which raised triable issues such as contributory negligence on the part of the deceased and reliance made on **Peter Weyama –vs- Emmanuel OdunguOrodi [2015] eKLR**, that the learned magistrate by refusing to set aside the ex-parte judgment prejudiced the appellant by denying it the right to be heard on merit. Reliance was also made on **John Peter Kiria –vs- Alice M. Kanyithia [2013] eKLR.** It was further submitted that the default judgment was irregular as the 1st Defendant in the trial court was never served with the summons.

5. The 1st respondent on their part submitted that the instant appeal is fatally defective for the reasons that the order appealed from was never included in the record of appeal and neither did the appellants file a supplementary record of appeal. The appellant relied on this was made on the case of **Salama Beach Hotel Limited & 4 Others –vs- Kanyariri& Associates Advocates & 4 Others (2016) eKLR**. In opposition to grounds one (1) and three (3) of the memorandum of appeal, the respondent submitted that the summons were served on the appellant who failed to enter appearance within the timeframes required in law and the appellant never offered sufficient reasons for the delay in entering appearance and thus no good cause was shown so as to enable the trial court to exercise its discretion to set aside the ex-parte judgment. Reliance was made on **Fidelity Commercial Bank Ltd –vs- Owen Amos Ndung'u& Another, HCCC No. 241 of 1998 (UR), Shah –vs- Mbogo& Anor (1967) E.A. 740** and **Kanji Naran –vs- Velji Ramji (1954) 21 EACA 20** amongst other authorities. It was further submitted that the appellant had not demonstrated how its rights to be heard had been violated and further that the issue as to the 2 nd respondent having not been served with summons to enter appearance could not be submitted upon by the appellant as it had no instructions to act for the said 2nd respondent.

C. Re-evaluation of evidence

6. This being a first appeal, this court is obliged to reassess, re-evaluate and re-examine the evidence and exhibits produced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified and therefore giving an allowance for that (See **Selle& another -vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123).** This court ought not to interfere with the exercise of the discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion (See**Ephantus Mwangi and Another –vs- Duncan Mwangi Wambugu (1982) – 88) IKAR 278).** Further in the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court. What matters in the analysis is the substance and not its length. (See Supreme Court of Uganda's decision in **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634** and **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR).**

7. In a nutshell, the application which was before the trial court was seeking orders for setting aside of the ex-parte judgment dated 20/03/2018 and leave to file defence and have the matter heard on merit. The grounds in support of the application were that the inadvertent delay by the appellant in forwarding the summons to its insurer hence delaying the appointment of advocates to act in the matter. The other ground relied upon by the appellant was that it has a good defense with triable issues.

8. The said application was opposed by the plaintiff who contended it was deposed that the applicant was aware of the matter and was served with summons but failed to enter appearance and was later served with notice of entry of judgment and thus no explanation had been given as to the failure to appoint advocates. The 1st respondent further deposed that the defense annexed to the application does not have triable issues.

9. The trial court delivered the impugned ruling dismissing the application wherein the court held that the appellant was served with summons to enter appearance, the notice of entry of judgment and that the delay in entering appearance was inordinate and inexcusable.

10. It is this ruling which is subject of this appeal.

D. Issues for determination

11. I have considered and analyzed the pleadings and the submissions in this appeal and it is my opinion that the main issue for determination is whether the trial magistrate erred in law and fact in dismissing the appellant's application dated 3/04/2018.

12. However, I note that the 1st respondent raised an issue in their submissions to the effect that the instant appeal was defective and ought to be struck out for failure to include the order appealed from in the record of appeal. As a preliminary issue, it is my view that the same ought to be determined *in limine* as its decision will determine the rest of the decision in this appeal.

E. Determination of the issue

13. As to whether the instant appeal is defective for failure to include the order appealed against in the record of appeal, *section 65(1)(b) of the Civil Procedure Act* provides that an appeal shall lie to this court (High Court) *from any original decree or part of a decree of a subordinate court, on a question of law or fact. Order 42 Rule 2 of the Civil Procedure Rules 2010, it is provided that*: -

> ***"Where no certified copy of the decree or order appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of Act until a copy is filed."***

14. Under Order 42, Rule 13(4)(f) of the Rules the *judgment, order or decree appealed from, and, where appropriate, the order (if*

any) giving leave to appeal are some of the documents which should be included in a record of appeal. As such, it is clear that the order being appealed from ought to be included in the record of Appeal. I have perused the record of appeal and noted that indeed there was no copy of the order appealed from which was included in the record of appeal. The question which ought to be answered in the circumstances is whether this failure is fatal to the appeal?

15. The Court of Appeal in **Emmanuel Ngade Nyoka v Kitheka Mutisya Ngata [2017] eKLR** held as follows in an appeal against a decision of the High Court (in sustaining an appeal where a copy of the decree was not included in the record of appeal): -

> ***"……. According to the Judge, the record of appeal before him had a certified copy of the judgment of the trial court. Consequently, he reasoned, the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.***
>
> ***We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon courts to go for substantive justice as opposed to technicalities. Further holding otherwise would have run counter to the overriding objective as captured in sections 1A and 1B of the Civil Procedure Act. Finally, one would ask what prejudice did the appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any."***

16. Further, in **Abdirahaman Abdi v Safi Petroleum Products Ltd. & 6 Others [2011] eKLR,** the Court of Appeal while discussing the import of Article 159 of the Constitution in dispute resolution held: -

> ***"…….Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its documents. The court in that regard exercise judicial discretion".***

17. In ***Nicholas Salat v. IEBC & 6 Others, CA (Application) No 228 of 2013,)*** the Court of Appeal further held that: -

> ***"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness."***

18. It is my view that the failure to include a copy of the decree appealed from in the record of appeal is not fatal to the appeal herein and so as to make the same liable for striking out. In my opinion, the said failure is a mere procedural technicality and which is curable under article 159 of the constitution. In my opinion, the appellant included a certified copy of the ruling in the record. A reading of the said ruling will inform any person as to the orders the court made.

19. Further it can be noted from the court record that the Respondents have all along been in court even on the day the directions were taken. They however failed to disclose to the court the said omission. It is my view therefore the appeal herein was proper.

20. Having opined as above, the next issue to determine on is whether the trial magistrate erred in law and fact in dismissing the Appellant's application dated 3/04/2018. As I noted earlier, the application before the trial court sought for the orders for setting aside of the ex-parte judgment dated 20/03/2018 and leave to file defence and have the matter heard on merit. Order 10 Rule 11 of the Civil Procedure Rules (and under which Order the instant application was brought) empowers the court to set aside an ex parte judgment for default of appearance and defence. The principles applicable under this rule were laid down by the Court of Appeal in **Pithon Waweru Maina -vs- ThukaMugiria [1983] eKLR** and restated in **Toshike Construction Company Limited v Harambee Co-operative Savings & another [2019] eKLR** as: -

> ***"(a)Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court 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 EA Cargo Handling Services Ltd [1974] EA 75 at 76 C 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 has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah vs Mbogo [1967] EA 116 at 123B, Shabir Din vs Ram Parkash Anand (1955) 22 EACA***
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> ***48. (c) Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo vs Shah [1968] EA 93."***

21. The matters which should be considered by the court in an application to set aside interlocutory judgment were laid down in **Pithon Waweru Maina -vs- Thuka Mugiria [1983] eKLR** where the Court of Appeal held that: -

> ***"The matter which should be considered, when an application is made, were set out by Harris J in Jesse Kimani v McConnel [1966] EA 547, 555 F which included, among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable to set aside or vary the judgment, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in Mbogo v Shah [1968] EA 93, 95 F. There is also a decision of the late Sheridan J in the High Court of Uganda in Sebei District Administration v Gasyali [1968] EA 300,301,302 in which he adopted some wise words of Ainley J, as he then was, in the same court, in Jamnadas v Sodha v Gordandas Hemraj (1952) 7 ULR 7 namely: "The nature of the action should be considered, the defence if one has been brought to the notice of the court, however, irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court." And, because it is a discretionary power it should be exercised judicially, or in the Scots phrase, used by Lord Ainslie in Smith v Middleton [1972] SC 30: "... in a selective and discriminatory manner, not arbitrarily or idiosyncratically," for otherwise, as Lord Diplock said in his speech in Cookson v Knowles [1979] AC 556: "... the parties would become dependent on judicial whim ..."***

22. It is therefore clear from the aforesaid provisions that the court has power to set aside the interlocutory judgment and allow the Defendants herein to file a suitable defence. However, such leave is not to be granted as a matter of course. The court must satisfy itself that there is a good explanation that has been advanced to set aside such judgment and upon such terms that it would deem fit in the circumstances for the reason that such action would definitely be taking a plaintiff back in time causing delay in the conclusion of her case especially where the matter had proceeded to formal proof and judgment given.

23. The appellant herein in the supporting affidavit sworn by Jaquiline Ndirangu the Legal Officer with Fidelity Shield Insurance Company and which was its insurer deposed to the effect that failure to enter appearance was inadvertently caused when the summons were forwarded by the appellant to the Claims department of the insurer but who failed to note the nature of the documents was that they required to be referred to the legal department to enable them instruct advocates to defend the appellant and which mistake was realized when the appellant was served with notice of entry of judgment. In my view, the reasons advanced by the appellant to this extent was not sufficient to warrant the exercise of the court's discretion in its favour. It's trite that a case in court belongs to a litigant and has a duty to ensure that the same proceeds well. Failure by the appellant to follow up on the matter in my view is an indication of how casual it took the matter before it. From the affidavit of Service on record, the appellants were served with the summons to enter appearance on 16/11/2017 and which summons it was deposed were forwarded to the insurer on the same day. The appellant did not follow up the matter with its insurer so as to establish whether the same had been defended and/or the progress of the same until when it was served with the notice of entry of judgment on 26/03/2018. The conduct by the appellant in my view seems indolent and this court ought not to accept the explanation to that respect as it will be encouraging indolence in litigation.

24. Further, from the explanation by the said Legal Officer, there was evidently lack of diligence on her part. She ought to have exercised due care and diligence to give their advocates proper instructions and in good time.

25. However, it is trite law that no party should be penalized just because there was a blunder particularly by his or her advocate. Indeed, in the case of **Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR**, it has been held that blunders will continue being made and that, just because a party has made a mistake does not mean that he should not have his case heard on merit. Further in the case of **Prime Bank Limited vs Paul Otieno Nyamodi [2014] eKLR**, it was held that it did not follow that just because a mistake had been made, a party should suffer the penalty of not having his case heard on merit. A court should not assist a party who had "deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice" as was held in the case of **Shah vs Mbogo (Supra)**. However, having had due regard to the cases of **John Peter Kiria& Another vs Pauline Kagwiria [2013] eKLR** and**Kenya Pipeline Company Limited vs Mafuta Products Limited [2014] eKLR** amongst several other cases whose gist was that no party should be shut out from ventilating its defence; that a court may set aside interlocutory judgment if a party had a reasonable defence and that at all possible times; cases should be heard on merit, it is my view that despite the very poor handling of this matter by the appellant's insurer, it is only fair and just to allow the appellant to exercise its fundamental right to be heard as enshrined in Article 50 (1) of the Constitution of Kenya. The appellant has shown its intentions to be heard and it is my view that it would not be in the bests interests of justice to deny them an opportunity to be heard. The prejudice that the 1st respondent would suffer for the delay in the conclusion of his case by having it heard on merit is one that can be compensated by way of costs.

26. Further I concur with the appellant that its draft defense raises triable issues. The Court of Appeal in **Toshike Construction Company Limited v Harambee Co-operative Savings & another [2019] eKLR** in determining whether a defense raises triable issues held thus: -

> ***"The defence need only raise a bona fide triable issue, which is 'any matter that would require further interrogation by the court during a full trial'. The Black's Law Dictionary defines the term 'triable' as, 'subject or liable to judicial examination and trial'. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court. See the Patel case (supra) and Olympic Escort International Co. Ltd. & 2 Others vs Parminder Singh Sandhu & Another [2009] eKLR…"***

27. I have examined the draft defence and it is my opinion that the same raises issues that go to the root of the subject matter in dispute and it cannot be said to be frivolous. It raises triable issues. The appellant pleaded contributory negligence and further denied vicarious liability. In my opinion, these are issues which needs to be tried in a full trial. The learned magistrate failed to consider these weighty issues and as such the discretion in that respect ought to be interfered with.

28. The appellant in its submissions raised an issue to the effect that the default judgment was irregular as the 1st defendant in the trial court (2nd respondent herein) was never served with the summons to enter appearance. The 1st respondent however submitted that the issue ought not to be determined as the appellant was not on record for the said 2nd respondent. I find this position misplaced. The Court of Appeal in **Kwanza Estates Limited v Dubai Bank Kenya Limited (In Liquidation) & 2 others [2019] eKLR** held thus: -

> ***"The position taken by the Judge is consistent with the decision of this Court in the case of James Kanyiita Nderitu & another vs. Marios Philotas Ghikas& another [2016] eKLR on which the Judge relied to the effect that once it comes to the notice of the court that a judgment is irregular, the court does not have to be moved to set it aside. It can do so suo motto without venturing into considerations whether the intended defence raises triable issues or whether there was delay in applying to set aside the irregular judgment."***

29. It is therefore clear from the above authority that a court needs not be moved so as to consider issue of service of summons. Section **78 (2)** of the **Civil Procedure Act** provides that: -

> ***"Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this act on courts of the original jurisdiction in respect of suits instituted therein"***

30. It is by invoking of this section that I will consider the issue as to service of summons as if this court is the trial court.

31. From the affidavit of service on record, the summons to enter appearance were served upon the appellant only. There is no evidence of the same having been served upon the 2nd respondent. Order 5, Rule 7 of the Civil Procedure Rules 2010 provides that save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant. The 1st respondent did not serve the 2nd respondent yet it was the 1st defendant in the suit. In my opinion, the 1st respondent looked around for the softest landing in between the two defendants. That is why they served the appellant alone. In the plaint, the 1st respondent prayed for judgment to be entered both jointly and severally against the defendants. As such, the court in entering judgment ought to have considered that the 1st defendant was not served with the summons to enter appearance. It is not explained why the court decided to enter judgment as against the appellant alone. In my opinion, the judgment was not regular for that reason. As such it ought to be set aside and the 1st respondent ordered to serve the 2nd respondent so that it can defend the suit.

32. As for the service of summons upon the appellant, the same was never contested and in my opinion the same was proper. The affidavit of service tells it all. However, as the court held in **Tree Shade Motors Ltd vs DT Dobie & Anor [1995-1998] 1EA 324**, even if service of summons is valid, the judgment will be set aside if the 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.

33. Having found that the appellant's draft defense raised triable issues; that though the appellant and its insurer were indolent in defending the suit and the reasons proffered were not sufficient but nonetheless the appellant ought not to be condemned unheard and further that the 2nd respondent was not served with summons to enter appearance. It is my view that the Learned trial magistrate erred in law and fact in dismissing the appellant's application which was before him. It is my view that therefore, the instant appeal ought to be allowed and in doing so, the ruling orders dated 10/07/2018 ought to be set aside and the application be allowed.

34. In the end the appeal succeeds and due to the nature of the Appeal each party shall bear its own costs.

35. It is ordered.

DELIVERED, DATED and SIGNED at EMBU this 11th day of November, 2020.

L. NJUGUNA

JUDGE

In the presence of: -

.....for the Appellant

.....for the Respondents