



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 648 OF 2011

FM.....APPELLANT

VERSUS

EKW.....RESPONDENT

(Being an appeal from the Ruling of the Hon.Hon. S.A. Okato Senior Principal Magistrate in Nairobi Civil Suit No. 8147 of 2007 delivered on 23rd November 2011

JUDGMENT

The Appeal herein is against the ruling of the learned magistrate Hon. S.A. Okato delivered on the 23rd November 2011 in which he dismissed an application dated the 2nd September, 2011. In the said application, the defendant/Appellant herein had moved the lower court seeking among other orders; a stay of execution of the decree issued on the 12th August, 2011 and warrant of attachment of moveable property in execution of the decree issued on 15th August, 2010 and any consequential orders thereto. The Appellant had also sought to set aside judgment delivered on the 2nd February, 2011 and that the suit be set down for hearing interpartes on its merits, and that the Auctioneers charges and costs be borne by the Respondent in any event.

The application was premised on the grounds that appear on the body of the same and was supported by the affidavit sworn by Henry Emung'a Advocate for the defendant and a supplementary affidavit sworn on the 10th October, 2011 by FM the Appellant herein.

The Respondent opposed the application via a replying affidavit sworn on the 22nd day of September 2011.

In the affidavit in support of the application, the deponent who was the counsel on record for the Appellant averred that he was served with a hearing Notice on 30th July 2010 which he duly received but forgot to forward the same to their Nairobi office which was handling the matter and where the main file was. As a result, the Appellant was not informed of the hearing date as required and therefore failure to attend court on their part was due to inadvertent omission on the part of the counsel and the Appellant should not be put to suffer.

In the replying affidavit, the Respondent averred that the application was brought with undue delay and the court being a court of Equity ought not to entertain; the same that the Appellant had not offered any kind of security for the decretal sum; that since the inception of the lower court matter, all the correspondences have been forwarded to Appellant's Advocates' Nakuru office and at no time did the Advocate indicate that the same be forwarded to Nairobi office; that the Appellant's Counsel was served with the hearing notice and the application was merely calculated to deny the Respondent the fruits of his lawfully secured judgment.

Upon hearing the parties, the learned magistrate dismissed the application and made a finding that failure to attend court on the part of the Appellant was deliberate and since there existed no good defence on record, the application lacks merit.

The aforesaid ruling is the subject of the Appeal herein, in which, the Appellant listed four grounds of Appeal, in the Memorandum of Appeal dated the 15th December 2011 as follows:

- 1. The Learned Magistrate erred in law and fact by refusing to set aside judgment delivered on 2nd February, 2011 upon the appellant's non-attendance at the hearing when the appellant had shown that his non-attendance was caused by no fault of his own but by the mistake of counsel.**
- 2. The Learned Magistrate erred in law and fact by refusing to set aside judgment delivered on 2nd February, 2011 partly on the basis that a statement of defence had not been filed when the same had been filed in the court record and served.**
- 3. The Learned Magistrate erred in law and fact by refusing to set aside judgment delivered on 2nd February, 2011 when the appellant had shown that he had a good defence to the suit and should have been given a chance to be heard.**

4. The Learned Magistrate erred in law and fact by refusing to set aside judgment delivered on 2nd February, 2011 without considering the appellant's right to be heard as enshrined in the constitution of the said Republic.

The Appeal was disposed of by way of written submissions which the parties duly filed.

The court has considered the grounds of Appeal and the submissions by the parties. In his submissions, the Appellant contends that the defence filed in civil suit No. 8147 of 2007 raises triable issues and therefore the trial court erred in asserting that the defence raises no triable issues. A number of authorities were quoted in that regard being that of **Richard Murigi Wamai Vs. The A.G. & another (2018) eKLR** to support the fundamental principle of law to the effect that no party should be condemned unheard. The case of **Patel Vs. East Africa Cargo Handling Services Limited (1074) E.A. 75** was also relied on, in which the court held that the court's discretion to do justice between the parties is unfettered and that it may be just to set aside an *ex parte* judgment to avoid hardship or injustice arising from inadvertence or mistake even though negligent, but the discretion should not be exercised to assist anyone to delay the course of justice. The Appellant also cited the case of **Kenya Pipeline Company Limited Vs. Mafuta Products Limited (2014) eKLR** to advance the same principle of the court's discretion to set aside an interlocutory judgment.

It was submitted that the non attendance at the hearing was caused by no fault of the Appellant but by mistake of a Counsel and this has been adequately explained in the supporting affidavit. The case of **Edney Adak Ismail Vs. Equity Bank Limited HCCC No. 27** of 2012 was relied on in which the court stated as follows:

“.....In law; the discretion that a court of law has in deciding whether or not to set aside *ex parte* order was made to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle.....”

The Appellant further relied on the overriding objective in sections 1A and 1B of the Civil Procedure Act which enjoins the court to ensure there is just determination of the proceedings, in a timely and efficient manner at a cost affordable to the respective parties. He urged the court not to visit the mistake of Counsel upon a client and cited the case of **Stephen Boro Gitih Vs. Family Finance Building Society & 3 others** and application number Nai.263 of 2009 in which the court stated

“It is true that where the justice of the case mandates, mistakes of advocates even if they are blunders should not be visited on their clients where the situation can be remedied by costs and also the case of *Lucy Bosire vs. Kehancha Div. Land dispute Tribunal & 2 others* where the court held;

“It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case determined on its merits. (See the case of *Kiptoo Chemwolo & Another Vs. Augustine Kubende (1986) KLR 492.*

With regard to whether there is a cause of action in the matter before the trial court it was the Appellant's submission that, there is none. Counsel contended that the only known cause of action if at all, is that of divorce, if adultery was ever committed and unless the Respondent filed a matrimonial cause, the issue of damages, as pleaded in the matter before the trial court, cannot arise.

On the part of the Respondent, it was submitted that the Appeal is incompetent, fatally and incurably defective in that the Appeal challenges a judgment delivered by the Honourable Court on 2nd February, 2011 and was lodged over 10 months after the delivery of the same. Counsel contends that at the time of filing the Memorandum of Appeal, the decree or order appealed against was not filed until the 9th October, 2018 a period of over 7 years since the delivery of the judgment. The Respondent argued that in the absence of a decree or order appealed from no legitimate Appeal can be said to have been lodged against the decision of a subordinate court. He cited the provisions of Order 42 rule 2 of the Civil Procedure Rules.

With regard to the certificate of delay dated the 31st August, 2017 it was submitted that the same was issued to a different firm of Advocates namely N.O. Sumba & Co. Advocates which firm has never been on record for the Appellant in this matter and that it covers a delay period of between 29th September 2016 and 11th October, 2016 only. It was suggested that the same is not genuine and does not cure the delay. In this regard, the case of **Gregory Kreme Kyuma Vs. Marietta Syokau Kyema Civil Appeal 16 of 1988** was relied on in which, Kwach J.A. had this to say about **Section 79G of the Civil Procedure Act.**

“A certificate of delay issued in accordance with the terms of that section covers only the requisite period for preparation and delivery to the Appellant of a copy of the decree or order appealed against. It does not and cannot be used to cover a period as it is suggested in the certificate, which may be required to obtain copies of proceedings and judgment. So the certificate of delay filed and relied upon by the Appellant was absolutely worthless and totally incapable of remedying the delay that occurred.....”

On whether the defence raises triable issues, the Respondent submitted that the Appellant did not file a defence to the amended plaint responding to the new issues raised and therefore, the defence raises no triable issues as the issues raised in the amended defence were not rebutted. The case of **Winfred Njoki Clarke Vs. Hotel Intercontinental Nairobi & Another (2018) eKLR** was relied on in which the court stated;

“In the absence of any rejoinder from the defendants, the statements of the plaintiff and her witnesses remain uncontroverted”

On the submission that failure to attend court was due to mistake on the part of the counsel on record for the Appellant and not his client, the Respondent submitted that the Appellant's personal address and his residence where he was served with the plaint is in Nakuru and so are his advocates and service of the hearing notice was effected upon his advocates in Nakuru. That their failure to attend court was out of negligence and the excuse tendered is not plausible. The respondent relied on the case of **Julius MbaabuMareteVs. Tom Ayora& 3 others (2018) eKLR** in which the Hon. Court stated thus:

“It is not always that a court will exercise its discretion in favour of a party if the mistake is by its Advocates as submitted by the plaintiff. The Advocate must demonstrate genuine and acceptable mistakes not outright negligence as in the case in this matter”

In the circumstances as these, a client is not left without a remedy. If professional negligence is proved, the Advocates professional indemnity insurance cushions advocates against such acts of negligence by compensating the clients by way of damages.....13. A case belongs to the plaintiff and it is its duty to take steps to progress it. Leaving a case to the Advocates without checking on its progress is also negligence on the part of the plaintiff”

The court was asked to dismiss the Appeal.

The court has considered the submissions together with the authorities cited.

The matter before the trial court proceeded *ex parte* as counsel for the Appellant did not attend court during the hearing though he had been served with a hearing notice. It is not denied that he was served with a hearing notice but the reason given for non attendance was that the hearing notice was served in the Nakuru office but the file for the matter was in the Nairobi office and by an oversight counsel forgot to forward the same to Nairobi for purposes of the hearing and consequently there was no attendance on their part and that of the Appellant because he was not notified about the hearing. Counsel for the Appellant has admitted his mistake and has urged the court not to visit his mistake upon an innocent client. He has cited several authorities to support his contention.

I am alive to the fact that setting aside of an *ex parte* judgment is the discretion of the court and in so doing, such discretion is unfettered but the same should be exercised judiciously and not capriciously – see the case of **Kenya Pipeline Company Ltd. (supra)** and that of **Shah Vs Mbugo (1967) E.A. 166** where the court held that:

“This discretion to set aside as *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it's not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. “29”. However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.

Coming from that background, it is not in dispute that the matter before the lower court proceeded *ex parte* as the Appellant and his counsel did not attend court. The reason given for non attendance was that the hearing notice was served in the Nakuru office but the file was in their Nairobi office and by an oversight, Counsel forgot to forward the same accordingly for preparation and notification of the hearing date to the Appellant and consequently both counsel and the Appellant failed to attend court.

The court has noted the Respondent's submissions in that regard to the effect that Counsel for the Appellant received the hearing notice. Though they have argued that the appellant and his Counsel are residents in Nakuru and that the address of service for the Appellant's Advocate on record is in Nakuru, an Advocate can operate a branch office in a different town and that does not call for filing of a notice of change of Advocates because it is the same firm only that the physical addresses are different. Counsel for the Appellant was forthright in admitting his mistake of not forwarding the hearing notice to their branch in Nairobi. The Respondent has submitted that, the omission amounts to negligence and that the excuse is not plausible and has relied on the case of Julius MbaabuMarete (*supra*). The learned magistrate in his ruling seemed to agree with the Respondent by stating that failure by Counsel and the defendant to attend court was deliberate.

In my considered view, the excuse tendered by counsel for the Appellant for his failure and that of Appellant to attend court is plausible and ought to have been a sufficient reason to persuade the trial magistrate to set aside the *ex parte* proceedings and not drive the Appellant from the seat of justice without being given an opportunity to be heard. The justice of this case mandates the mistake of the counsel should not be visited on the Appellant. This is in recognition of the fact that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. (See Philip KeiptoChemwolo (*supra*)).

On the second ground of Appeal, the record is clear that there is a defence on record which was filed on 5th November, 2007. It is not clear when summons to enter appearance and the plaint were served upon the Appellant but a memorandum of appearance was filed on the 2nd November 2007 which therefore means that the defence on record was filed on time as required under the law. It is important for this court to point out that the ruling the subject of this Appeal was made pursuant to an application to set aside an *ex parte* judgment that was obtained after the matter proceeded *ex parte*. It was brought under Order 12 rule 7 of the Civil Procedure Rules. Order 12 relates to hearing and consequences' of non attendance by a party and how to challenge such proceedings.

An *ex-parte* judgment entered under this order is different from an interlocutory judgment entered under Order 10 which relates to consequences of non appearance and default in filing of a defence. The Appellant has mixed the two scenarios in his submissions. The Appeal before the court lies squarely under the purview of the provisions of Order 12 of the Civil Procedure Rules and not Order 10.

In his ruling, the learned magistrate stated that there exists no good defence on record and the application must fail. In my view, the trial court erred in taking into account the merits of the defence while dealing with the application. As pointed out hereinabove there was a defence

on record and the application before the trial court was not to strike out the defence or to set aside an interlocutory judgment under Order 10. The only issue that the learned magistrate ought to have considered is whether the Appellant had given a good reason for his failure to attend court and depending on the finding by the magistrate, he would then consider whether the ex parte proceedings would be set aside or not. The learned magistrate considered matters that were beyond what was before him for consideration.

The Respondent also submitted that the Appeal was filed out of time. Counsel argued that the judgment sought to be set aside was delivered on the 2nd February 2011 while the Appeal was filed on 16th December 2011. The court has perused the memorandum of Appeal and the same is clear that the appeal is against the ruling delivered on the 23rd November 2011 in which the learned magistrate declined to set aside the ex parte proceedings that led to the aforesaid judgment – my understanding is that the Appeal is against the ruling and not the judgment and therefore, the Appellant was within time to Appeal when he filed the memorandum of Appeal. However, the finding of the Court in the Appeal will determine whether the ex parte judgment would also be set aside if the orders of the learned magistrate are found not to have merits.

The Respondent has also taken issue with the Appellant for not availing a copy of the decree on time as provided for under the law. He, however, admits that the same was filed before this court albeit late. I am of the considered view that no prejudice was suffered by the Respondent as a result of the delay in availing the decree on time.

In sum, the court finds that the Appeal has merit and its allowed. The Ruling delivered by the learned magistrate on 23rd November, 2011 and the judgment delivered on 2nd February, 2011 and the resultant decree issued on the 12th August, 2011 in CMCC No. 8147 of 2007 are hereby set aside. The suit to be set down for hearing on merits.

Each party to bear its own costs of the Appeal.

Dated, signed and delivered at NAIROBI this 14th day of February, 2019

L. NJUGUNA

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent