



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 13 OF 2017

BETWEEN

KENYA INDUSTRIAL ESTATES LTD.....APPELLANT

AND

JOHN ODWORY KULOHOMARESPONDENT

(Being an Appeal from the Ruling in Busia Chief Magistrate's Court Civil Case No.518 of 2013 by Hon. G.N Wakahiu- Chief Magistrate).

JUDGMENT

1. **Kenya Industrial Estates Limited**, the appellant herein, was the defendant in the Busia Chief Magistrate's Court Civil Case Number 518 of 2013. In the ruling delivered on 20th September 2017, the learned trial magistrate declined to review his judgment delivered on 8th May 2017.

2. The appellant was aggrieved and filed this appeal. The appellant was represented by the firm of Mburu Maina & Company advocates. In the Memorandum of Appeal, the appellant set out eight grounds of appeal as follows: -

- a) The learned trial magistrate erred in law and in fact in dismissing the appellant's Notice of Motion application 30th May 2017.
- b) The learned trial magistrate erred in law and in fact in failing to appreciate that the appellant had made out a case for setting aside his judgment delivered on 8th May 2017.
- c) The learned trial magistrate erred in law and in fact in failing to consider the submissions made on behalf of the appellant in support of its application dated 30th May 2017.
- d) The learned trial magistrate erred in law and in fact in failing to appreciate that the judgment sought to be set aside was a product of ex- parte proceedings.
- e) The learned trial magistrate erred in law and in fact in failing to uphold the appellant's constitutional right to fair hearing.
- f) The learned trial magistrate erred in law and in fact in failing to appreciate that legal representation in legal proceedings has to be expressed not inferred or imposed.
- g) The learned trial magistrate erred in law and in fact in failing to appreciate that the respondent's advocates acted unilaterally in fixing of the hearing dates without notice to the appellant's advocates which prejudiced the appellant.
- h) The learned trial magistrate erred in law and in fact in failing to recognize that the prejudicial consequences of the ex-parte proceedings which gave rise to the ex-parte judgment.

3. The respondent was represented by the firm of Balongo & Company Advocates. It was contended that there was nothing to warrant for the prayers sought.

4. This matter came up for directions on 27th September 2018, it was agreed by both counsel that the appeal be canvassed by way of written submissions. Both parties filed and exchanged the same.

5. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no

advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

6. The application dated 30th May 2017, was brought before the learned trial magistrate by way of Notice of Motion under Order 9 Rule1, Order 12 Rule 7, Order 22 Rule 25 of the Civil Procedure Rules and Article 47 of the Constitution of Kenya. The substantive prayer therein was the setting aside of the judgment of 8th May 2017.

7. The application was hinged on the ground that the defendant was not present at the hearing that culminated in the disputed judgment.

8. Upon my perusal of the record, I find that most of the time this matter came up for hearing before the learned trial magistrate, Mr. Makokha was holding brief for the firm of Nyamweya for the defendant. There are instances where there was no appearance for the defendant but the court satisfied itself that there was service. The learned trial magistrate cannot be faulted for dismissing the application to have judgment entered reviewed. There was no merit to do so.

9. I accordingly find that there is no merit in the present appeal. I dismiss it with costs to the respondent.

DELIVERED and SIGNED at BUSIA this 4th day of February, 2019

KIARIE WAWERU KIARIE

JUDGE