



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 586 OF 2010**

**NATION MEDIA GROUP ..... APPELLANT**

**VERSUS**

**KENNETH SIMIYU KANGUKHA ..... RESPONDENT**

**JUDGMENT**

1. The facts leading to this appeal are clear and straight forward. The appellant herein *Nation Media Group Limited* was the defendant in Milimani Chief Magistrate's Civil Case Number 1257 of 2009. It had been sued by the respondent (then the plaintiff) who was seeking special and general damages for malicious prosecution. The respondent had alleged in his plaint dated 31<sup>st</sup> December 2008 that the appellant had maliciously and without any justifiable cause caused his arrest and prosecution for the offence of theft contrary to *Section 275* of the *Penal Code* and that he was acquitted of the said charges on 6<sup>th</sup> August 2007 for lack of evidence.

2. The defendant (appellant) denied the respondent's allegations in a statement of defence dated 21<sup>st</sup> April 2009. The court record shows that hearing of the suit proceeded *ex parte* on 14<sup>th</sup> June 2010 after the defendant and his counsel failed to attend the trial court despite having been duly served with a hearing notice. Judgment in the suit was delivered on 13<sup>th</sup> September 2010 and the respondent was awarded general damages in the sum of KShs.350,000 together with costs of the suit and interest.

3. The court record further reveals that the appellant moved the trial court on 23<sup>rd</sup> September 2010 vide a chamber summons dated 21<sup>st</sup> September 2010 seeking that the *ex parte* judgment be set aside and that it be granted leave to defend the suit.

4. By consent of the parties, the application was canvassed by way of written submissions. In a considered ruling delivered on 25<sup>th</sup> November 2010, the trial court concluded that the appellant's application was not merited and the same was dismissed with costs to the respondent. The appellant was aggrieved by the trial court's ruling hence this appeal.

5. In its memorandum of appeal dated 18<sup>th</sup> December 2010, the appellant mainly complained that the learned trial magistrate erred in law and in fact when he failed to take into account its application dated 6<sup>th</sup> July 2010 when determining the chamber summons dated 21<sup>st</sup> September 2010; in misinterpreting and misapplying the provisions of *Order 1XB*; in failing to find that mistakes of counsel should not be visited on the defendant; and, in not appreciating that it was in the interest of justice to have the suit heard on merit. Lastly, the appellant contended that the trial court's decision was based on wrong legal principles.

6. The appeal was prosecuted by way of written submissions which were highlighted before me on 13<sup>th</sup> December 2018. Learned counsel *Mr. Mukungu* appeared for the appellant while learned counsel *Miss Motambili* represented the respondent.

7. I have carefully considered the grounds of appeal, the written and oral submissions made by learned counsel for both parties and all the authorities cited. I have also read the record of the lower court.

8. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am fully aware of my duty as the first appellate court to re-examine and to reconsider the evidence presented before the lower court to arrive at my own independent conclusions regarding the validity or otherwise of the decision challenged on appeal.

9. I have read the impugned ruling delivered on 25<sup>th</sup> October 2010. As noted earlier, in that ruling, the learned trial magistrate *Hon. Mr. Okato* (P.M) was determining the chamber summons application dated 21<sup>st</sup> September 2010 which sought *inter alia*, the setting aside of the *ex parte* judgment dated 13<sup>th</sup> September 2010 and all consequential orders thereto. The application also sought courts leave to allow the defendant to defend the suit. From the foregoing, it is evident that the application dated 6<sup>th</sup> July 2010 was not before the trial court for its determination and consequently, the trial court did not err in any way when it failed to take the aforesaid application into account when considering the chamber summons dated 21<sup>st</sup> September 2010. If the trial court had taken the said application into account, it would have considered an irrelevant factor and this would have amounted to a serious misdirection on its part. It may be important to mention that from

the record, it is apparent that the said application was in fact never prosecuted. Nothing therefore turns on ground 2 of the appellant's grounds of appeal.

10. Turning to the other grounds of appeal which I will consider together as they are to a large extent interrelated, the appellant challenged the exercise of the trial court's discretion in dismissing its application dated 21<sup>st</sup> September 2010 on grounds that the court did not fully appreciate the law governing the setting aside of *ex parte* judgments; the significance of having suits determined on merit and the general proposition of law that a litigant should not be punished for the mistakes of his or her advocate.

11. I wish to start by pointing out that the jurisdiction of an appellate court to interfere with findings of fact made by the lower court in the exercise its discretion though wide is not unlimited. The law is that an appellate court should be slow to interfere with findings of fact by the trial court unless it is satisfied that the findings are not based on any evidence or they are based on a misapprehension of the evidence or on the wrong legal principles – See: *Kiruga V Kiruga & Another [1988] KLR 348; Makube V Nyamoro [1983] KLR 403*.

12. It is also trite that an appellate court should not interfere with the trial court exercise of discretion except where it is satisfied that the lower court misdirected itself in some matter and consequently arrived at the wrong decision or it is clear from the case considered as a whole that the trial court abused its discretion and as a result occasioned a miscarriage of justice – See: *Mbogo & Another V Shah, [1968] E.A. 93*.

13. A reading of the impugned ruling shows clearly that in making his determination, the learned trial magistrate was fully cognizant of the provisions of the law governing the setting aside of *ex parte* judgments entered for failure to file defence or for non-attendance. He started his ruling by appreciating the fact that the application under his consideration had been made under the then *Order 1XA Rules 10 and 11 and Order 1XB Rule 8* of the *Civil Procedure Rules*. He then proceeded to analyze the reasons that the appellant's counsel had advanced as an explanation for his failure to attend the court on the date the application was scheduled for hearing namely, the 14<sup>th</sup> June 2010 despite having been served with a hearing notice informing him of the hearing date about seven months earlier. The learned trial magistrate found the reason offered by the appellant's counsel to be unsatisfactory as it was not backed by any evidence. He had the following to say:

***“...In paragraph 4 of the supporting affidavit it is deposed that despite service of an appropriate notice, the hearing of this suit scheduled for the 14<sup>th</sup> June 2010 was inadvertently omitted from their diary. Where is the evidence that that date was not diarized? There is no evidence...”***

14. I have looked at the affidavit that was sworn on 21<sup>st</sup> September 2010 by counsel practicing in the firm of advocates then on record for the appellant *Mr. Ambrose Muthama Mulandi*. I have noted that indeed an extract of his diary for 14<sup>th</sup> June 2010 was not part of the documents annexed to the affidavit as proof of the claim that his failure to attend the trial court on the aforesaid date was not deliberate but was occasioned by some inadvertent omission of diarizing the date in his diary as alleged.

15. It is also evident from the ruling that the learned trial magistrate went further to look at the appellant's counsel's conduct in the matter and his submission that mistakes solely attributable to his office should not be visited upon his client. From the tenor of the passage in the ruling that dealt with this submission, I have no doubt in my mind that the learned trial magistrate was fully alive to the general proposition that a litigant should not be punished for the mistakes of his or her counsel but he was not persuaded that the circumstances in the case before him warranted the application of that general principle. He relied on the authority of *Municipal Council of Thika & Another V Local Government Workers Union (Thika Branch), Civil Appn No. 41 of 2001* which was binding on him in which the court held that in some cases, the ends of justice may be better served by courts refusing to excuse mistakes done by advocates and allowing them to accept the consequences of their negligence in the conduct of litigation on behalf of their clients. The learned trial magistrate was satisfied that the appellant's case fell in the category of cases envisaged in the *Municipal Council of Thika & Another V Local Government Workers Union Case (supra)*.

16. In view of the foregoing and given the material that was before the trial court, I am unable to fault the learned trial magistrate for reaching the decision he did on the application that was before him. I say so because the appellant has not demonstrated that the learned trial magistrate wrongly exercised his discretion or that he considered extraneous factors or that he applied the wrong legal principles in arriving at his determination. I therefore find no basis upon which I can interfere with his ruling dated 25<sup>th</sup> November 2010.

17. In the result, it is my finding that this appeal lacks merit and I hereby dismiss it with costs to the respondent.

It is so ordered.

**DATED, DELIVERED and SIGNED at NAIROBI this 13<sup>th</sup> day of February, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Mukungu for the appellant

Miss Motambili for the respondent

Mr. Salach: Court Assistant